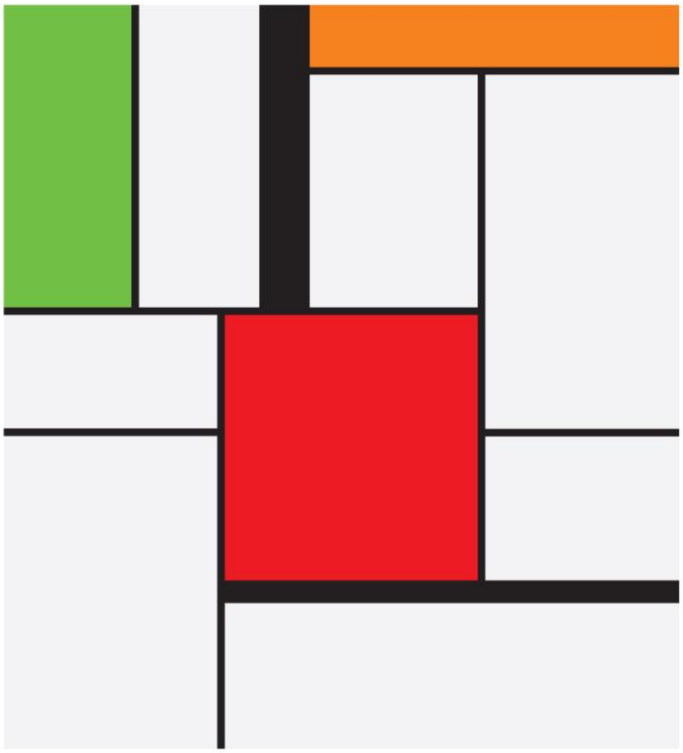
Legal and tax topics for doing business in the Netherlands



COX + PARTNERS
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LawyersforIT®
Cordemeyer & Slager Advocaten

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Introduction

The Dutch economy traditionally is a very open and internationally oriented economy. In 2011 Dutch exports totalled 404.6 billion euros and despite the economic downturn the Dutch export trade was the second highest in Europe after Germany. As the fifth largest exporter of goods in the world, the Netherlands occupies a prominent position when it comes to world trade.

Around 6,300 foreign companies have established 8,800 operations in the Netherlands. Examples include Coca-Cola, BASF, Cisco Systems, Microsoft, Nike, Sabic, Siemens and Yakult. Foreign companies made inward direct investments worth 445 billion euros.

All in all the Netherlands is considered as an attractive economy to do business in and it is recognized worldwide for its transparency, fairness and effectiveness. According to the World Bank, the Dutch government is the fourth most effective in the world after Denmark, Finland and Sweden.

One of the reasons the Netherlands is regarded, as an attractive country to do business in is its tax system. The Dutch tax system has a number of features that may be very beneficial in international tax planning. Examples are (i) the Dutch ruling practice, which provides clarity and certainty on tax positions in advance and (ii) the broad tax treaty network. The Netherlands has signed treaties with more than 90 countries that ensure the avoidance of double taxation on income and capital.

From the perspective of a foreign party the four main ways it can enter the Dutch market can be distinguished as: (i) incorporation of a new company (greenfield operation), (ii) acquiring an existing business (M&A), (iii) opening a local branch and (iv) through cooperation on a contractual basis.

Foreign parties that are considering doing business abroad, but are not sure yet in what country they wish to do business, have numerous topics to take into account. In this book, without the aim of being complete, we describe a number of legal and tax topics with the aim of facilitating such foreign parties when the Netherlands is among the countries in which they are considering doing business.

COX + Partners and Cordemeyer & Slager / Advocaten are, also thanks to the global IGAL network of which they are a member, well equipped to assist and provide advice to companies abroad about entering the Dutch market. This book has been divided into Part A that was prepared by Cordemeyer & Slager / Advocaten and covers the legal topics and Part B that was prepared by COX + Partners and covers the tax topics.

If you have any questions or require Dutch legal and/or tax advice, please feel free to contact us.

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Cordemeyer & Slager / Advocaten B.V. and COX + Partners, October 2014.

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PART A – Legal topics

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1. Corporate law

Introduction

Under Dutch law the following legal entities can be distinguished: (i) companies with limited liability (such as the *naamloze vennootschap*, the N.V., and the *besloten vennootschap met beperkte aansprakelijkheid*, the B.V.), (ii) foundations (*stichtingen*), (iii) cooperatives (*coöperaties*) and (iv) associations (*verenigingen*). These legal entities have in common that they have separate legal personality, which means that they have their own rights and obligations.

Next to these legal entities, one man businesses (*eenmanszaken*) and partnerships (*personenvennootschappen*) are also used as a form of doing business in the Dutch market. One man businesses (*eenmanszaken*) in fact are private individuals who do business at their own risk and account. This means full liability for such private individuals. Partnerships, that are a form of contract, do not have separate legal personalities as a result of which the partners, depending on the form of partnership used, are always liable to a certain extent for the obligations of the partnership.

What legal form can be best used in the Dutch market depends, among other things, on:

(A) the purpose and nature of the activities that will be performed;

(B) the type of control and governance that is desired;

(C) whether and to what extent interests should be transferable;

(D) whether and to what extent it is the aim to make and distribute profits; and last, but not least

(E) tax considerations.

In short, companies with limited liability (such as the N.V. and B.V.), cooperatives (*coöperaties*), one man businesses (*eenmanszaken*) and partnerships (*personenvennootschappen*) are commonly used for commercial purposes, i.e. with the purpose to generate profits, whilst foundations (*stichtingen*) and associations (*verenigingen*) are commonly used for non-profit purposes.

Schedule 1 contains an overview of the main characteristics per legal entity.
Although for commercial purposes, one man businesses (*eenmanszaken*) and the B.V. are most commonly used for commercial purposes, in this book we solely focussed on the B.V., because one man businesses are generally used by small sized enterprises (e.g. free lancers, small bakeries, barbershops etc.) only.

The N.V. is a public limited liability company and is mainly used as the legal form for publicly traded companies. Not only because the N.V. is the only legal form that may have bearer shares, but also because only N.V.s can be admitted to listing at the stock exchange and certain types of financial companies such as insurance companies and banks may be offered in the form of an N.V. only.

The B.V. was modelled on the basis of the N.V. and the two types of companies therefore have a lot in common. However, the B.V. is a much more flexible legal

form, because the law is less mandatory. The N.V. will in principle not be discussed in this book, unless it has a specific purpose in relation to the B.V.

A special feature of Dutch corporate law is the so-called large companies regime (*structuurregime*). This regime applies to companies that meet certain thresholds for a certain period of time regarding number of employees, and equity (*eigen vermogen*) and that have a works council. If the thresholds are met for a certain period of time, mandatory law requires that the large companies regime be applied. This regime has implications for the governance structure of the company and, amongst other things, means that a supervisory board is required. The large companies regime will not be discussed in this book, because – in general – it will not apply to newly incorporated or newly started businesses.

1.1 Incorporation of B.V.s

(A) How and by whom

A notarial deed of incorporation (*akte van oprichting*) is required for the incorporation of a B.V. It must be written in the Dutch language and executed by a civil-law notary (*notaris*). The deed of incorporation contains the articles of association (*statuten*) and must at least contain:

i. a statement of the founder willing to incorporate the B.V.;
ii. the articles of association;
iii. the amount of capital of the company (capital of 1 euro cent is sufficient; there is no minimum capital requirement);
iv. the nominal value of the shares;
v. other information, such as the name, place of residence/business and address of everyone who will become a shareholder of the B.V.; and
vi. additional information, such as the details of the management board members and, if applicable, the details of the supervisory board members.

A founder incorporates a B.V. by appearing in person before a civil-law notary or through a written proxy. Both private individuals and legal entities, national and foreign, can be a founder of a B.V. In case of a written proxy the civil-law notary will have to ascertain that whoever signed the proxy is indeed the same person as mentioned in the heading of the proxy, i.e. that the signature is authentic. If the proxy is signed on behalf of a legal entity the civil-law notary will also have to ascertain that the person who signed the proxy was authorized to sign it on behalf of the legal entity. In case of a foreign founder the authentications usually require a legalization by a local notary or lawyer and an apostille in accordance with the Apostille Treaty of 1961 provided the country concerned is a party to that treaty.

A B.V. has at least one shareholder and one management board member. One and the same person can fulfil the role of founder, shareholder and management board member. There can also be multiple founders, management board members and shareholders.

Usually the civil-law notary in close consultation with the founder(s) draws up the deed of incorporation and the articles of association. The management board member is responsible for registering the B.V. with the Dutch

Chamber of Commerce, but in practice the civil-law notary takes care of that. The preparation of the registration (most importantly collecting the necessary information) is done simultaneously with drawing up the deed of incorporation. Once the B.V. is incorporated, the articles of association can only be amended by a notarial deed of amendment (*akte van statutenwijziging*).

(B) Timing and cost

The timing and cost depends on the complexity of the B.V. The incorporation of a 'simple' B.V. on the basis of standard documentation can in principle be done in one day. In practice the incorporation of a B.V. takes at least 4 - 6 days. If the founder is a foreign company, for example, and the incorporation of the B.V. is done through a proxy given by the founder to the civil-law notary, it takes time to explain the various possibilities regarding the B.V. and gather the required authentications that the civil-law notary will require. The incorporation of a B.V. is however a straightforward procedure and can be easily done. Save for the aforementioned authentications there are no special procedures regarding foreign founders. The deed of incorporation can be executed as soon as the civil-law notary has all the required documents at his or her disposal.

The costs of incorporating a B.V. are mainly the costs of the civil-law notary involved. Although civil-law notaries generally invoices on the basis of an hourly rate, most civil-law notaries are prepared to give a capped or fixed fee for the incorporation of a B.V. Such capped or fixed fee will usually be made subject to certain conditions regarding the cooperation of the parties involved, the availability of information and duration and complexity of the process. A realistic estimate of the costs for the incorporation of a simple B.V. is around € 700 – 800 excluding VAT.

1.2 Articles of association: nature, topics and options

The articles of association can be defined as the fundamental (internal) corporate rules of the B.V. and have the power of law. These rules identify the B.V. and determine the rights, powers and obligations within the B.V. Acts that are in violation of the articles of association are null and void (*nietig*). The articles of association of a B.V. have to be registered with the Dutch Chamber of Commerce. In order to register the B.V. with the Dutch Chamber of Commerce, the articles of association must at least contain the following:

i. name, (registered) office and corporate objects of the B.V. The registered office must be in the Netherlands;
ii. the amount of the authorized capital (if any) and the nominal amount of the shares. In case there are different classes of shares, the number and (nominal) amount of each class of shares;
iii. the way in which the management board's duties will be provided for if one or more members of the management board are absent or unable to act.

Usually the articles of association contain more than the above written minimum, because parties choose to arrange the internal relationships within the boundaries of mandatory law as much as possible. The statutory provisions regarding the B.V. are to a large extent not mandatory, which enables parties to agree on tailor-

made provisions. For example, the articles of association can lay down rules with respect to the types of shares, voting rights of the shareholders, transferability of shares, the way the members of the management board are appointed, suspended and dismissed, requirements that have to be met by shareholders, whether there is a supervisory board, the decision-making procedures of the management board, the supervisory board and the general meeting of shareholders and how the B.V. is dissolved.

1.3 Shareholders' agreement

If a B.V. has more than one shareholder commonly, although not required, the shareholders enter into a shareholders' agreement to contractually arrange certain further matters. A shareholders' agreement has the advantage that, as opposed to the articles of association, it is not publicly available and therefore the agreements made therein can be kept confidential. If, for example, the shareholders wish to agree on a share value determination mechanism for the event a shareholder decides to offer its shares, but do not want those agreements to be publicly available, they will lay them down in a shareholders' agreement. Another advantage of a shareholders' agreement is that the parties involved can easily amend it as long as they agree with each other. A disadvantage is that if a party breaches the shareholders' agreement, the other party can in principle only claim specific performance (*nakoming*), unless agreed otherwise. As a matter of contract law a shareholders' agreement is only enforceable towards the contracting parties of that shareholders' agreement. It is not enforceable towards any party that is not a contracting party.

Shareholders' agreements commonly contain subjects such as: the financing of the B.V., appropriation of profits, share value determination procedure, appointment of the members of the management board, decision-making process of the shareholders, deadlock provisions in case of 50-50% shareholders, restrictions on the transfer of shares such as lock-up, good leaver/bad leaver provisions, tag-along/drag-along provisions, dispute settlement provisions, non-competition and confidentiality provisions.

1.4 Share capital

The capital of a B.V. is divided into shares. A share confers certain rights and obligations on its holder. Rights attached to shares are the right to receive dividends and entitlement to the reserves, the right of a proportional part of the balance of the assets in case of dissolution of the B.V., the right to vote and meeting rights such as the right to attend the general meeting of shareholders and speak at the general meeting of shareholders. In principle a shareholder has no other obligation than to pay up his share.

The articles of association may determine with respect to all shares or shares of a certain class or denomination: (i) that obligations of a contractual nature vis-à-vis the B.V., third parties or between shareholders are attached to the holder of the shares, (ii) that certain requirements have to be met before one is qualified to become a shareholder and (iii) that a shareholder in certain circumstances, as described in the articles of association, is obliged to offer and transfer all or part of his shares.

1.5 Types of shares

Under Dutch law there are two main types of shares: (a) registered shares (*aandelen op naam*) and (b) bearer shares (*aandelen aan toonder*). B.V.s can only issue registered shares, whilst N.V.s can issue both registered shares and bearer shares. What is the difference? The main characteristics of bearer shares are that the N.V. does not know who the owners of the bearer shares are and that bearer shares are freely transferable; no rights of first refusal or other transfer restrictions apply. The legal ownership of bearer shares used to be connected to the physical bearer share certificate; whoever held a bearer share certificate was the owner of the bearer share. Nowadays the physical bearer shares certificates of listed N.V.s have been replaced by a digital and heavily regulated system whereby banks and intermediaries play a crucial role. The main characteristics of registered shares are that the N.V. or the B.V. always knows who owns the registered shares and the issue of physical registered share certificates is prohibited.

The management of a B.V. has to maintain and keep up to date a shareholders' register that contains an overview of the names and addresses of the holders of the registered shares, the number and types of shares held by them, the denomination of the shares, the date on which they were issued and the dates on which the shares were transferred, repurchased by the B.V. or revoked by the B.V. The legal ownership of registered shares can only be transferred through execution of a notarial deed of transfer of shares by a civil-law notary. The ownership of a registered share can only be evidenced by an original or true copy of the notarial deed of issue or transfer of the share.

The law provides that registered shares of a B.V. are subject to transfer restrictions, unless the articles of association determine otherwise. The articles of association may determine that the registered shares are freely transferable, i.e. that no transfer restrictions such as rights of first refusal or approval rights apply. Registered shares of a B.V. can also be made subject to a lock-up in the articles of association, meaning that the shares are not transferable for a certain period of time. Such lock-up may however not be for an indefinite period of time, but should have a maximum duration. Five years is considered to be an acceptable maximum.

Apart from registered shares and bearer shares, shares can be divided into the following types: ordinary shares (*gewone aandelen*), preference shares (*preferente aandelen*), priority shares (*prioriteitsaandelen*), non-voting shares (*stemrechtloze aandelen*) and non-profit shares (*winstrechtloze aandelen*). The starting point is that a registered share in the capital of a B.V. provides equal rights to the holders of them. However, specific, additional rights can be attached to certain classes or denominations of shares in the articles of association.

Preference shares are shares that give special financial rights to the holders, such as the right to receive a certain part of the profit in preference to the other shareholders. Such preference can also be made cumulative, meaning that if in a certain year the B.V. does not make a profit the right to the profit accumulates to the next year. Another example of a right of preference is a liquidation preference, giving certain preference rights to the balance of the assets of the B.V. in case of liquidation. Priority shares usually give the holders certain controlling rights. An example of such a controlling right is the right to appoint, suspend and dismiss members of the management board. A B.V. may issue non-voting shares that entitle the holder to all shareholder rights except the right to vote. Non-profit shares entitle the holder to all shareholder rights except the right to receive

profits. A share should at least give entitlement to voting rights, profit rights or both and may not be non-voting and non-profit at the same time.

An alternative for the issue of non-voting shares is the issue of depositary receipts of shares (*certificaten van aandelen*). The issuance of depositary receipts of shares means that the legal and economic entitlement attached to the shares is separated. It is done by issuing the shares to a legal entity, usually a foundation (*stichting*), that becomes the legal owner of the shares and simultaneously issues depositary receipts that give the economic entitlement attached to the shares to the depositary receipt holders. Such a foundation is incorporated with the sole purpose of holding and administering the shares for the benefit of the depositary receipt holders whilst it remains the legal owner of the shares. As a result of the legal ownership of the shares the foundation also has the voting rights and the right to attend and speak at the general meeting of shareholders. Although a holder of non-voting shares does not have the right to vote at a general meeting of shareholders, it has the right to attend and speak at the meeting. Therefore if a B.V., for example, wishes to limit the number of shareholders or wishes to limit the number of persons who are entitled to attend and speak at the general meeting of shareholders, the issue of depositary receipts can be considered a good alternative. The articles of association of the B.V. in that case will have to explicitly determine that depositary receipt holders do not have meeting rights (*vergaderrechten*) such as the right to attend and to speak at a general meeting of shareholders. The instrument of the issue of depositary receipts is used for various purposes. Examples include estate planning and employee incentive plans. In both cases B.V.s and their shareholders wish to give economic entitlement without giving control or meeting rights to the beneficiaries.

1.6 Shareholders and the general meeting

In the Netherlands the corporate governance of a B.V. is based on a dual system. This means that there are at least two corporate bodies: (i) the management board (*het bestuur*) that manages and represents the B.V. and (ii) the general meeting of shareholders (*algemene vergadering*) (hereinafter: '**General meeting**') that has all other rights that are not conferred by law or the articles of association on the management board.

(A) Role and authority

All corporate powers that have not been assigned to any corporate body of the B.V. by law or the articles of association are conferred on the General meeting. Several powers are under mandatory law conferred on the General meeting and cannot be assigned to another corporate body such as the management board. Examples include, among others, the power to amend the articles of association, to dissolve the B.V. voluntarily and to adopt the annual accounts.

(B) General meeting and decision-making

A B.V. is obliged to organize a general meeting at least once a year, within six months of the end of the B.V.'s financial year. In this annual general meeting the management board reports the state of affairs of the B.V. to the general meeting and proposes the adoption of the annual accounts and the granting of discharge (*decharge*) to the members of the

management board for their policy in the financial year. Extraordinary general meetings can be held in addition to the annual general meeting.

The management board and, if present, the supervisory board are authorized to call a general meeting. Shareholders representing at least one per cent of the issued and outstanding share capital can be authorized by a district court (*rechtbank*) to call a meeting as well, provided certain conditions are met. A general meeting must be convened no later than on the eighth day before the date of the meeting by means of an convocation letter, unless the articles of association determine that a longer period of time should be taken into account. The general meeting cannot take valid resolutions if the notice period has not been complied with, unless all holders of meeting rights have agreed with the fact that resolutions will be taken nonetheless and the members of the management board and the supervisory board have been given the opportunity to give their advice prior to the decision-making. The invitation letter must set out the subjects and agenda of the general meeting. Unless the articles of association determine otherwise and the shareholders and other holders of meeting rights agree, notices convening general meetings can be sent electronically (e.g. per email) provided the electronic message is readable and reproducible and the shareholders and other holders of meeting rights have, beforehand, provided the B.V. with an electronic address for that purpose.

The law determines that a holder of meeting rights have the right to attend general meetings of shareholders, in person or through a written proxy, and to speak at such meeting. The following persons have, next to the shareholders, meeting rights: (i) holders of depositary receipts to which the articles of association confer meeting rights, (ii) to pledgees (*pandhouders*) and usufructuaries (*vruchtgebruikers*) having voting rights and (iii) pledgees and usufructuaries not having voting rights, but the articles of association determine that they have meeting rights and the deeds of pledge and usufruct do not determine otherwise.

In principle the general meeting must be held at the location(s) stated in the articles of association. This may be outside the Netherlands. It can occur that the general meeting is or must be held elsewhere. This is possible provided that all holders of meeting rights have agreed to hold the general meeting elsewhere and the management board and supervisory board have been given the opportunity to advise on this matter.

Every shareholder has the right to attend the general meeting, speak at the general meeting and to exercise his or her voting right at the general meeting. The shareholder can do this in person or by giving a representative a written proxy. This can also be done electronically provided it is allowed by the articles of association. In general, resolutions of the general meeting can only be passed with an absolute majority (i.e. 50% plus one vote) of the votes cast. The law and the articles of association can state that more than an absolute majority is required in order to make certain decisions. For example, in case of the amendment of the articles of association or the dissolution of the B.V. a majority of two-thirds of the votes may be required. Some decisions by the general meeting can only be taken unanimously. Besides a majority requirement, a quorum may be required as well.

The general meeting can also pass resolutions without holding a general meeting provided all holders of meeting rights have agreed with this form of decision-making. Unless the articles of association determine otherwise, agreement with this form of decision-making can be recorded electronically.

(C) Liability

The liability of shareholders is in principle limited to the amount paid up by them on the shares, The law states that a shareholder is not personally liable for the actions of the B.V. and is not bound to contribute to the losses of the B.V. other than for the amount the shareholder should have paid up for his shares.

A shareholders can however be held liable if he received a dividend while he knew, or reasonably should have known that, at the time of payment of that dividend, the B.V. would not be able to continue to fulfil its obligations towards its creditors.

Please note another exemption regarding the liability of a shareholder if he is considered as a policymaker (*beleidsbepaler*) in paragraph 1.7(C) below and in case of tort.

1.7 Management board

The management board is responsible for the management of the day-to-day affairs of the B.V. The members of the management board, in fulfilling their duties, are obliged to take into account the interests of the B.V. and its business. Every member of the management board is authorized to represent the B.V. towards third parties, unless the articles of association determine that two members or more of the management board jointly may only represent the B.V. externally. Who is authorized to represent a B.V. can be determined by consulting the online trade register of the Dutch Chamber of Commerce.

Although the management board determines the policy and management of the B.V., the articles of association may determine that certain management board resolutions require prior approval of another corporate body such as the general meeting or the supervisory board. The articles of association may further determine that the management board should abide by certain guidelines of another corporate body such as the general meeting. The management board is obliged to abide by such guidelines, unless they contradict the interests of the B.V. and its business.

If a member of the management board has a direct or indirect conflict of interests with the B.V. it should not take part in the decision-making process. Dutch law provides for a mechanism to deal with the situation if the management board, as a result thereof, is not able to take a decision.

In the Netherlands a B.V. can opt for a one-tier or a two-tier board system. Traditionally Dutch corporate law provides for a two-tier system for the management of a B.V. The two-tier system provides for a management board that is responsible for the day-to-day management of the B.V. and an optional and separate supervisory board that supervises the management board.

A recent introduction, designed among other things to facilitate foreign investors who are used to working in a one-tier board environment, is the option of a one-tier board system for B.V.s. In a one-tier board system the management board consists of executive board members (*uitvoerende bestuurders*) who are responsible for the day-to-day management, and non-executive board members (*niet-uitvoerende bestuurders*) who are responsible for the supervision of the executive board members. These two types of board members are members of one and the same board.

The one-tier board system has consequences in terms of liability of the non-executive members. Their liability exposure is greater compared to the potential liability of the members of a separate supervisory board.

(A) Appointment, suspension and dismissal

The first management board members of a B.V. are appointed in the deed of incorporation. Otherwise management board members are appointed by the general meeting. An appointment can be for a limited or unlimited period of time. Both private individuals and legal entities can be appointed as members of the management board. All management board members have to be registered with the Chamber of Commerce.

A management board member can at all times be suspended or dismissed by the corporate body that is empowered to appoint such a management board member. The supervisory board can at all times suspend management board members. The general meeting can revoke the suspension by the supervisory board, except if the large companies regime applies.

(B) Task and authority

The management board is responsible for the management of the day-to-day affairs of the B.V. whereby it is obliged to take into account the interests of the B.V. (*vennootschappelijk belang*) and its business. The management board is only allowed to act in accordance with the B.V.'s objects (*doel*) as described in the articles of association. Each management board member has a duty of care that requires him or her to properly perform his or her management tasks.

(C) Internal and external liability

Under Dutch corporate law the members of the management board and supervisory board of a B.V. can in principle not be held personally liable for obligations of the B.V. Personal liability of the members of the management board and supervisory board of a B.V. can only be derived from specific provisions in the law or based on tort (*onrechtmatige daad*). The following categories of internal and external liability can be distinguished:

i. liability towards the B.V.;
ii. liability towards third parties based on tort (*onrechtmatigedaad*);
iii. liability following bankruptcy (*faillissement*);
iv. liability towards the tax and social security authorities; and
v. liability for misleading annual accounts.

Liability toward the B.V. basically results from a breach of duty (or contract) that each of the management board members has towards the company. The law provides that the management board members may become (jointly and severally) liable in case of improper management (*onbehoorlijk bestuur*). Improper should be read to mean 'clearly negligent and insufficient' and therefore not only improper in the moral sense of the word. Liability towards the B.V. is in principle a collective liability; it attaches to all management board members regardless of whether each individual actually took part in the improper act or omission. This form of liability materialises only very seldom in practice.

Third parties can base their actions on the general legal doctrine of tort (*onrechtmatige daad*). The statutory provisions provide that any civil wrong by which personal harm or damage to property is caused to another person shall render the person by whose fault such harm or damage has occurred liable to redress the same. If a management board member, while acting in his function as managing board member, causes harm or damage as outlined above to a third party in a tortious manner, he incurs liability together with the B.V. The Dutch Supreme Court has ruled that a management board member may be personally liable, if there is 'serious negligence' (*voldoende ernstig verwijt*) of the management board member, which has resulted in harm to a third party. Whether or not there is 'serious negligence' depends on the specific circumstances of the case. An example of such tortious or negligent act is a management board member causing the company to enter into obligations knowing that the company will not be in a position to meet such obligations.

In general, when management board members of a company harm the interests of a creditor of the company by insufficiently ensuring that the company fulfils its (existing) payment obligation(s) with respect to this creditor, they may incur liability. Often, this refers to situations in which the creditors' rights to redress are frustrated by: (i) the management board members causing the company to enter into obligations knowing that the company will not be in a position to meet such obligations, (ii) the creation of the image of creditworthiness towards a third party although the management board member knows or should have known that the contrary is true, (iii) to strip the company with the purpose of frustrating creditors' rights, (iv) selective payment of creditors at the time of the bankruptcy of the company or at the time that the management board members knew that the bankruptcy of the company was foreseeable or probable and rights of other creditors of the company have been harmed.

When a company finds that it is unable to pay its debts relating to taxes and social security contributions, it has the duty to notify the relevant authorities at once. The penalty for failing to do so is severe, namely: the management board members become jointly and severally liable for these debts, unless (a) they show evidence that the failure to perform this duty (the notification) cannot be attributed to them and (b) they show evidence that the inability of the company to pay its debts is not caused by manifestly improper management (*kennelijk onbehoorlijk bestuur*).

Please note that the personal liability of management board members also applies to co-policymakers (*medebeleidsbepalers*). These are individuals who effectively control the company, as if they were official management board

members. A shareholder or employee of the company who is not a management board member but performs the role of a management board member and has effective control of the company can be considered a co-policymaker.

The general meeting of shareholders may discharge the management board for the management conducted by it. The discharge given has only internal effect and cannot therefore be invoked against third parties. Such discharge is usually granted at the annual general meeting of shareholders. As regards the possibility of insurance, it should be noted that a specific type of insurance exists in the Netherlands for management board members. This insurance is usually referred to as 'D&O-insurance'.

A shareholder can, in principle, not be held liable for acts or omissions of a management board member. Shareholders are not personally liable for acts performed in the name of the company and cannot be obliged to contribute to losses of the company in excess of their contribution to the share capital.

1.8 Supervisory board

If the two-tier board system is applied the articles of association may provide for a supervisory board. It is optional, unless the large companies regime applies. Only private individuals may be a supervisory board member. The supervisory board has the task of supervising the policy of the management board and the day-to-day affairs of the B.V.

(A) Appointment, suspension and dismissal

The first supervisory board members of a B.V. are appointed in the deed of incorporation. Otherwise supervisory board members are appointed by the general meeting. An appointment can be for an unlimited period of time. Every supervisory board member may at all times be suspended or dismissed by the corporate body that is authorized to appoint the supervisory board members. All the supervisory board members have to be registered with the Chamber of Commerce.

(B) Task and authority

The supervisory board has two main tasks: supervision and advice. Supervision also covers the future policies in the long term. The supervisory board furthermore has to supervise the functioning, the quality and continuity of the management board. Supervision also covers subsidiaries and other companies related to the B.V. as well as important management board decisions, such as mergers and acquisitions.

The supervisory board has several tasks as set out in the law, such as the calling of a general meeting, providing the general meeting with information, an advisory role at the general meeting and representation in case the management board has a conflict of interest. Additional tasks can be added in the articles of association as well.

(C) Internal and external liability

The liability of the supervisory board is basically similar and based on the same principles as the liability of the management board. The supervisory board members can be held (internally) liable for improper performance of the tasks charged to them (*opgedragen taken*), (externally) in case of tort if there is personal blame in respect of the damage. In the event of bankruptcy of a B.V. the supervisory board members can be held liable for the amount of debts remaining unpaid after the liquidation of the B.V.'s assets, if (a) the supervisory board members have discharged their duties in a manifestly improper manner and (b) there is prima facie evidence to show that this has been a major cause of the B.V.'s bankruptcy.

1.9 Acquiring an existing business (M&A)

(A) General

i. Process and transaction documentation

If a foreign party considers to enter into the Dutch market one of the options is to acquire an existing Dutch company. Under Dutch law M&A can generally be structured as a share transaction (*aandelenfusie*), an asset transaction (*bedrijfsfusie*) or through a legal merger (*juridische fusie*) or split-off (*juridische splitsing*).
Private (*onderhandse*) transactions regarding the shares in the capital of B.V.s form the majority of M&A transactions in the Netherlands. Next to the selling and buying parties, the parties involved are usually corporate finance advisors or investment bankers, (M&A) lawyers, tax advisors and accountants. The Dutch M&A market is a developed one wherein M&A is widely used as a strategy.

Generally an M&A transaction is kicked off by the corporate finance advisor or investment banker involved by sending out an information memorandum or similar document after a non-disclosure or confidentiality agreement has been signed by the receiving party. Such non-disclosure agreements usually contain a penalty clause, because a selling party will not settle with only the possibility to claim specific performance (*nakoming*) as a means of enforcing the agreement. Although non-disclosure agreements seem pretty standard, it is advisable to have them reviewed by a local lawyer to ensure they will adequately protect your interests.

LOI

From the legal perspective the next step is the execution of a letter of intent or similar document such as heads of agreement or memorandum of understanding. Substance over form applies under Dutch law and therefore the title or form of the document is less relevant than the actual contents for the question whether it constitutes a legally binding agreement. These documents have in common that they all are a form of contract. Although the necessity for a letter of intent or similar agreement depends on the specific transaction at hand, it is common to enter into one to,

amongst other things, avoid misunderstanding about the starting points for the transaction, the conditions under which a transaction might occur, next steps and exit strategy. A seller will usually try to limit the potential buyer's possibilities to adjust the indicative purchase price and to walk away from a transaction as much as possible whereas a potential buyer will want to achieve the opposite and be able to adjust the indicative purchase price and to walk away as much as possible.

A letter of intent usually contains at least the following subjects, it being understood that the contents of every letter of intent or similar agreement is different and depends on the specific transaction at hand: (i) agreement on the starting points and structure of the transaction such as an indicative purchase price based on certain assumptions that will be verified in the due diligence investigation, (ii) the conditions precedent (*opschortende voorwaarden*) for the transaction such as a satisfactory due diligence investigation for the buyer, agreement by the parties on the transaction documentation, such as the share purchase agreement ('**SPA**'), internal approvals and financing, (iii) an agreement on type, duration and procedure regarding due diligence, (iv) interim provisions regarding the continuation of the business between the signing of the letter of intent and the signing of the transaction, (v) no material adverse change or effect having occurred between the signing of the letter of intent and the signing of the transaction, (vi) an agreement on exclusivity and a long stop date, (vii) an agreement on cost allocation in case of break up of the negotiations and (viii) a time line.

Signing of the letter of intent is usually followed by the kick off of the due diligence investigation. Dependent on the type of transaction, parallel to the (end of the) due diligence investigation a first draft of the SPA is usually prepared. In case of a controlled auction a first draft of the SPA will usually already be available in the data room for review.

The SPA provides for the legal title for the transfer of the ownership of the shares, i.e. the actual sale and the purchase of the shares. The signing of the SPA does, however, not result in the transfer of the ownership of the shares, because under Dutch law a notarial deed is required for the transfer of the ownership of shares in the capital of a B.V. Therefore a civil-law notary must always be involved in an M&A transaction regarding the shares in a B.V.

SPA

Main topics in the SPA are: (i) purchase price mechanism and adjustment (if any) whereby the mechanism will, for example, depend on the extent in which the purchase price is fixed or dynamic due to an earn out mechanism and on when the effective date is, i.e. when the shares will become for the risk and account of the buyer, (ii) closing and payment mechanism whereby it is commonly agreed that the purchase price is transferred to a bank account of the civil-law notary involved. Mandatory law requires each civil-law notary to have a special type of bank account that is

protected by law and cannot be affected by bankruptcy. Because the law protects the civil-law notary's bank account and the law also dictates that civil-law notaries should be independent this procedure is regarded by the market as trustworthy. The use of the civil-law notary's protected bank account is subject to strict regulatory requirements. Usually the parties agree that the civil-law notary will hold the transferred amount for the benefit of the buyer until the notarial deed of transfer of shares is executed after which the notary will hold the transferred amount for the benefit of the seller. That way it is prevented as much as possible that the seller will have transferred the ownership of the shares to the buyer without having received the corresponding purchase price or vice versa that the buyer will have paid the purchase price without having become owner of the shares. A complicating factor in this respect is the involvement of banks that, for example, provide acquisition finance, because generally the banks will not accept that the purchase price or parts thereof are held for the benefit of the seller before security (e.g. pledges and mortgages) has been vested for their benefit.

Other main topics in SPAs are (i) conditions precedent (*opschortende voorwaarden*) such as merger control, other required consents and approvals and the absence of material adverse changes or effects, (ii) interim period (i.e. provisions for the period between signing and closing if they do not occur on the same date), (iii) representations, warranties and indemnities and (iv) liability of the seller under the SPA.

Other documentation

Next to an LOI and SPA the following documentation is required or is usually used in an M&A transaction: (i) a notarial deed of transfer of shares, (ii) a notarial letter that sets outs the funds flow and how the civil-law notary manages the funds flow, (iii) a closing agenda that on a document level sets out which steps have to be taken and who has to sign which documents to achieve a successful closing, (iv) documents in connection with the necessary corporate action, amongst which, shareholders and board resolutions in connection with, for example, the replacement of members of the management board of the target company and (v) if the transaction is a leveraged transaction or when parallel to the M&A transaction a refinancing takes place: financing documents, such as loan documents and security documentation such as deed of pledges and mortgage, in connection with acquisition finance.

ii. Due diligence and disclosure mechanism

Under Dutch law a seller of the shares in the capital of a company has a duty to inform (*mededelingsplicht*) the potential buyer whether there are issues that could be important for the buyer's assessment of the target company. Although a potential buyer may assume that the seller's statements are true, the potential buyer on its turn has a duty to investigate (*onderzoeksplicht*) the target company to prevent that it buys the shares on the basis of wrong

assumptions. If a seller however withholds material information from the potential buyer, it cannot avert a claim from the buyer by asserting that the buyer has not complied with its duty to investigate.

Whether a due diligence investigation is necessary or advisable and the scope and depth thereof depends on the actual matter at hand such as the size and nature of the target company and its business. If for example a business depends on two main supplier and customer contracts only, it would be advisable to review these contracts to verify to what extent the business of the target company is sustainable.

A buyer will usually want to perform a due diligence investigation, not only on legal grounds, but to verify, amongst other things, the legal, financial, tax, business and environmental aspects of the target company. The reasons for a buyer to perform a due diligence investigation differ per buyer. A strategic buyer generally will have different motives and plans with the target company than a financial buyer such as private equity. The latter will clearly have an exit strategy to consider in the near future. Due diligence investigations can for example have the aim to verify (i) whether the target company will be able to (continue to) generate sufficient revenues in the future, (ii) whether the buyer's assumptions regarding the purchase price and, in case of private equity, future exit strategy are correct and (iii) whether there are any risks or issues that have an impact on the purchase price or the business that will have to be mitigated in the transaction documentation.

Due diligence investigations are more and more done in online data rooms offered by independent data room providers such as Merrill Datasite, Intralinks or Imprima. Often the data room is set up on the basis of due diligence questionnaires from the buyer. One of the advantages of the use of such online data rooms is that the information disclosed by the seller is digitally available.

The starting point of the disclosure mechanism in the SPA is the principle that if a buyer is aware or could have been aware of a breach of the SPA on the basis of the disclosed information, it cannot claim a breach of the SPA.

Therefore, one of the recurring discussion points regarding SPAs is what is regarded as disclosed information. A seller will want the definition of disclosed information to be as broad as possible whereas a buyer will want to limit the scope of the definition of disclosed information as much as possible. Due to the use of online data rooms it became easier to ring-fence the contents of the data room. Usually the contents of the online data room, including the online Q&A sessions that have been held, are burnt on a CD, DVD or USB stick that is attached to the SPA as a schedule so that there is no discussion about what was disclosed in the data room. To avoid discussions about the contents of the digital data carrier and to limit the risk that one of the parties tampers with them it can be considered to give the digital data

carrier in escrow with an escrow provider or civil law notary. The discussion usually further focuses on whether and to what extent the definition of disclosed information should encompass information made available by the seller to the buyer outside the data room such as site visits, management presentations and management interviews. The definition of disclosed information often also includes a disclosure letter. The use of a disclosure letter enables the seller to specifically and directly disclose to the buyer certain issues that the seller finds material in relation to the warranties given by it in the SPA. A buyer will want to limit the scope of the definition of disclosed information as much as possible by including that disclosed means only what has been fairly disclosed by the seller. Fairly disclosed can for example mean that only what appear from a *prima facie* review of the documents made available in the data room will be regarded as disclosed. With a *prima facie* review often is meant that references in documents in the data room to documents that have not been included in the data room will not be regarded as disclosed and may be left aside by the buyer. Notwithstanding the foregoing, due diligence and the disclosure mechanism remain subject to negotiations whereby different outcomes are naturally possible.

iii. Warranties and indemnities

Dutch law does not define what warranties are. Therefore, the meaning and effect of warranties depend on what the parties have agreed in the SPA. Usually warranties confirm a certain result. For example, that the shares have not been encumbered with a right of pledge. Should the shares contrary to the warranties have been encumbered with a right of pledge then the seller can be held liable on the basis of an imputable breach (*toerekenbare tekortkoming*) of the SPA.

A buyer usually will want a seller to at least confirm that the warranties are true and accurate. What warranties a buyer wishes to receive from the seller depends on the nature of the business, but usually includes warranties about the following topics: the shares, the annual accounts, taxes, the assets, compliance with laws, real estate, environment, employees, pensions, insurances, litigation, intellectual property rights and information.

SPAs usually determine that a buyer shall not have the right to serve a claim for damage in the event of a breach of a warranty if the information underlying such breach was disclosed in the disclosed information. Therefore, if a buyer has a due diligence finding that shows that a warranty is untrue, such risk or liability will have to be mitigated in a different way. If a due diligence finding has a direct monetary effect, such as a recurring cash out of the target company such finding may lead to a purchase price adjustment. If a due diligence finding identifies a clear risk without it being sure whether the risk will materialize such risk can be mitigated in the form of an indemnity. Indemnities are intended to allocate risks between the seller and the buyer. A common feature of indemnities is therefore that damage incurred by the buyer or the target company in connection with a topic

covered by an indemnity, for example taxes, shall be reimbursed in full by the seller to the buyer or the target company. Once again, all of this is always subject to negotiation.

(B) Limitation of liability and security

Sellers in the Dutch market generally do not accept unlimited liability and SPAs therefore always have limitation of liability clauses for the benefit of the seller. Liability in the SPA is generally limited in, amongst other things, amount, duration and scope whereby it is common to agree on a maximum overall cap of liability of the seller under the agreement. Such cap is often expressed as a percentage of the purchase price whereby for certain topics a higher cap will be accepted than for other subjects. Although always subject to negotiation, it is widely accepted in the Dutch market that a seller is liable under the warranties for a period long enough to enable a buyer to draw up at least one set of annual accounts to verify the warranties that have been given in relation to the target company. Dependent on whether the financial year (*boekjaar*) of the target company is equal to calendar year and the timing of the closing of the transaction a duration of 18 months is common. Moreover, it is common for a seller to accept potential liability for a longer period of time in connection with, for example, the warranties in relation to the ownership of the shares, taxes, and environmental issues or in connection with certain indemnities. A factor in relation therewith is the applicable limitation period (*verjaringstermijn*).

A further limitation of liability of a seller is possible in various other ways, for example by including the provision that the seller shall not be liable to the extent a specific provision or allowance in respect of a breach of the warranties has been sufficiently made in the annual accounts and a claim can be recovered under any insurance policy, or a breach of the warranties can be remedied by the seller.

Most buyers require a form of security of the seller to ensure that in case of a breach of the agreement there is sufficient recourse. Examples of forms of security used are escrow arrangements, bank guarantees, net equity statements, joint and several liability, surety and subordinated vendor loans. Private equity parties usually are not willing to give elaborate warranties, indemnities or security, because the limited life span of the funds. A solution that is used more and more in the Dutch market a warranty and indemnity insurance that provides the buyer security in the form of an insurance.

(C) Share transactions

i. Why and how

If a buyer wishes to acquire a B.V. and its business, acquiring the entire share capital of such B.V. is an efficient way to achieve this. Although in practice the owner of the shares will be regarded as the owner of the B.V., from a strict legal perspective the purchase of shares in the capital of a B.V. results in the buyer having become the owner of the shares and not the owner of the B.V. and its assets. The acquisition of the shares in the capital of a B.V. is nonetheless an efficient way of acquiring an entire

business at once. For the transfer of the ownership of the shares in the capital of a B.V. a notarial deed of transfer of shares is required.

(D) Asset / liability transaction

i. Why and how

An assets / liabilities transaction could be the route to be preferred if the buying party does not wish to acquire everything from the selling entity or if the selling company is an old company with a potentially risky legacy in the form of potential liabilities. Furthermore an assets / liabilities transaction enables a buyer to 'cherry pick' certain assets / liabilities from the selling party.

If parties choose for an assets / liabilities transaction, an asset purchase agreement has to be drawn up. Special attention then should then be paid to which assets will be transferred and how such assets are duly transferred under Dutch law. Pursuant to Dutch law every asset has to be transferred separately according to the appropriate methods of transfer of the assets concerned. Assets / liabilities transactions also affect the employees (see paragraph 2.6(B)).

Below several formalities in connection with the transfer of certain types of assets will be discussed.

Contracts

With the co-operation of his contracting party, a party can transfer his contractual relation with this contracting party to a third party by a deed drawn up between himself and the third party. This has the effect of transferring all rights and obligations to the third party, to the extent agreed upon. The asset purchase agreement can be considered as a deed.

Registered property

The transfer of registered property (e.g. real estate) requires a transfer by means of a notarial deed of transfer of registered property executed by a civil-law notary.

Moveable assets

Moveable assets are transferred by means of granting the possession (*bezitsverschaffing*) of the asset in question to the buyer.

Inventory

Inventory will generally consist of movable assets and is often transferred by granting the possession (*bezitsverschaffing*) of the assets to the buyer.

In case the assets concerned are not located at the premises of the selling entity and thus not in the possession of the seller, the assets must be transferred by means of a deed. This deed can be an authentic deed or a private deed. The asset purchase agreement can be considered as a deed to this purpose. It that case it is advisable to add a clause in the asset purchase agreement stating that the selling entity shall indicate where and with whom, these assets are located.

Furthermore, it is of importance that the inventory will be carefully identified, so that both parties know which things belong to the inventory (an annex in which the inventory is listed can be attached).

Accounts receivable

Accounts receivable are transferred by assignment (*cessie*) which can be effected by means of a deed intended for that purpose and by subsequently informing the debtors of the transfer.

The deed can be an authentic deed (i.e. a notarial deed) or a private deed. Please note that the deed should explicitly mention the transfer and delivery. Again, the asset purchase agreement can be considered as a deed to this purpose. The notice that has to be given to the debtors may be done by both the selling and the buying parties.

Accounts payable

An obligation is transferred from the obligor to a third person, if the latter assumes the same from the obligor. The assumption of the obligation only has effect against the obligee if the obligee consents thereto, after having been notified of the assumption by the parties.

(E) Legal merger or split off

i. Why and how

A legal merger (*juridische fusie*) or legal split-off (*juridische splitsing*) are a means of transferring, all or part of the property, rights and interests and liabilities by universal transfer of title (*onder algemene titel*) to an acquiring entity. The acquiring entity can be an existing legal entity or an entity that will be incorporated as a result of the legal merger or legal split-off.

As opposed to an asset / liability transaction whereby each separate asset and liability has to be transferred from the selling entity to the acquiring entity in accordance with applicable law, a legal merger or split-off comes into effect starting on the first day after the execution of the notarial deed of legal merger or split-off. A legal merger or legal split-off enables the acquiring entity to acquire all assets and/or liabilities at once, through the execution of a notarial deed of legal merger or a notarial deed of legal split-

off. A legal merger or split-off always requires the involvement of a civil-law notary.

In case of a legal merger the shareholders of the disappearing legal entity become shareholders of the acquiring legal entity, unless (i) the disappearing legal entity was a 100% subsidiary of the acquiring legal entity or (ii) the merging legal entities are both a 100% subsidiary of the same parent company.

Legal split-off has two main forms: (i) a full split-off (*zuivere splitsing*) whereby all assets and liabilities of the splitting company transfer by universal transfer of title to two or more companies and the splitting company ceases to exist and (ii) a partial split-off (*afsplitsing*) whereby the splitting company continues to exist and the assets and liabilities, in full or in part, of the splitting company transfer by universal title to one or more companies.

Only legal entities that have the same legal form are able to merge with each other or be subject to a split-off; it being understood that for the purpose of the statutory provisions regarding legal mergers and legal split-offs, the N.V. and the B.V. are regarded as legal entities with the same legal form. Consequently it is allowed to legally merge a B.V. with an N.V. or split-off part of the business of an N.V. to a B.V. or vice versa.

Cross border mergers

Dutch law, in accordance with European law, allows for N.V.s and B.V.s to merge cross border (*grensoverschrijdende juridische fusie*) with other companies that have share capital. Although cross-border split-offs are not yet provided for in the law, it is argued that certain cross-border split-offs are allowed, such as legal split-offs whereby the company that receives the assets and liabilities is a Dutch company.

Procedure

A legal merger and split-off both start with the preparation of a proposal by the management board of the company.

The management board of each party to the legal merger or split-off outlines, in a written statement, the reasons for the merger or split-off, indicating the expected consequences for the activities and with comments on the legal, economic and social aspects.

Each party to the merger or split-off shall deposit various documents at the Trade Register of the Chamber of Commerce. Documents which need not be deposited for public inspection and the comments of the management boards in respect of the proposed terms must be deposited by the management boards simultaneously at the office of the legal entity or, if there is no such office, at the address of an officer or management board member.

The parties to a merger or split-off will have to publish a notice of the deposit of the documents in a daily newspaper with national circulation, stating the trade register(s) of the Chamber of Commerce at which the same are deposited and the address where the same may be inspected pursuant to the previous paragraph.

The general meeting of shareholders may only adopt a resolution for the merger or split-off after one month has elapsed from the day on which all parties to the merger or split-off have published the notice of deposit of the proposed terms of the merger or split-off in the newspaper.

Within one month following the date that all parties to the merger or split-off have given notice of the deposit of the proposed terms of the merger or split-off, each other party in a legal relationship with such party may oppose the proposed terms of the merger or split-off by filing a petition with the District Court. The District Court will deny such petition if the party that files it has not succeeded in demonstrating that the legal merger or split-off will result in a deterioration of the potential redress position of that party giving.

(F) Merger control

The Netherlands Authority for Consumers and Markets ('**ACM**') is responsible for merger control in the Netherlands. In case of an M&A transaction, the transaction will have to be notified to the ACM if the following two criteria are met: (i) the total annual global turnover of the companies involved exceeds € 113,450,000 and (ii) at least two of the companies involved have an annual turnover in the Netherlands of € 30,000,000 or more.

If the acquiring company forms part of a group of companies, the turnover of the entire group has to be taken into account. The turnover of a company that sells part of the business does not have to be taken into account.

For companies in the healthcare sector M&A transactions have to be notified to the ACM if the following two criteria are met: (i) the total annual global turnover of the companies involved exceeds € 55,000,000 and (ii) at least two of the companies involved have an annual turnover in the Netherlands of € 10,000,000 or more.

If the following two criteria are met, the M&A transaction will have to be notified to the European Commission: (i) the total annual global turnover of the companies involved exceeds € 5,000,000,000 and (ii) at least two of the companies involved have an annual turnover in the European Union of a minimum of € 250,000,000.

The merger control procedure consists of two phases: (i) the notification phase (*meldingfase*) and (ii) the permit phase (*vergunningfase*). A notification should be done ultimately four weeks before the transaction is closed and is done by filling out a form that can be downloaded from the website of the ACM. The Dutch legislator limited the extent of information that the companies involved have to provide in the notification phase to limit

the administrative burden as much as possible. If a notification is not filed or not filed in time, the ACM is authorized to impose a fine. If the ACM, after a notification, decides that a permit is required the companies involved will have to provide more detailed information in accordance with a permit application form that can be downloaded from the website of ACM.

Although the procedure seems pretty straightforward it is advisable to engage a specialized anti trust lawyer to advise with respect to the merger control procedure. Our firm has close ties with such anti trust lawyers.

(G) SER Merger Code

An M&A transaction in the Dutch market should also comply with the SER Merger Code (*SER* Besluit *Fusiegedragsregels 2000*). The SER Merger Code is a form of self-regulation by the market; therefore it lacks a statutory basis and has the purpose of defending the interests of the employees in an M&A transaction through influence of the trade unions. A violation of the SER Merger Code may lead to a dispute resolution procedure before the dispute committee of the Dutch Social and Economic Council (SER). The decision is public. Violation of the SER Merger Code further has been taken into account in verdicts of the Dutch Enterprise Chamber (*Ondernemingskamer*). Notwithstanding the absence of a statutory basis the SER Merger Code is taken into account by the market.

The SER Merger Code applies to a merger in which at least one company is involved that generally employs at least 50 employees and that is established in the Netherlands. The core of the definition of what a merger is understood to mean in the SER Merger Code is the transfer of control.

The SER Merger Code does not (i) apply to mergers within a group of companies, (ii) apply to mergers as a result of bankruptcy, family or heritage law, (iii) apply to mergers in relation to a target company that generally employs fewer than 10 employees and (iv) apply to mergers that do not fall within the legal sphere of the Netherlands.

If the SER Merger Code applies, the trade unions involved have to be notified that a merger is being prepared. The notification has to be done before the parties have reached agreement about the merger and at such a point in the negotiation process that the trade unions involved can actually still influence the process and inform parties involved of their opinion about the merger. Apart from the notification as such, the trade unions should also be offered the opportunity to discuss elements of the merger, such as the reason of the merger and the expected social, economic and legal consequences of the merger.

Not only do the trade unions have to be notified and involved in a meeting by the merger parties, they should also be informed about the contents of a press release by the merging parties about the merger before the press release is made public. Notwithstanding the foregoing, the trade unions have no right to block the merger or give consent to it.

1.10 Opening a local branch

(A) How and by whom

To open a local branch, specific trade register forms have to be completed and submitted with the Dutch Chamber of Commerce. Although the list of questions in those forms seems impressive, the majority of the questions are pretty straightforward. In practice obtaining the documents that have to be certified or legalized and submitted to the Chamber of Commerce next to the forms require the most effort and time.

It is therefore recommended to involve a civil-law notary, because such civil law notary is authorized to sign and submit the forms and ancillary documentation on behalf of a foreign company, which simplifies the procedure. Our firm cooperates with a number of experienced civil-law notaries and can easily engage one.

Dependent on the nature of the business and whether the local branch has employees, a Dutch branch will also have to be filed with the Dutch Tax Authorities for CIT, VAT and Wage Tax purposes.

(B) Timing

The Chamber of Commerce needs 4 - 6 days to process the filed forms, but is usually quicker and also prepared to speed up the process if it is urgent. Including the filling out of the forms and gathering of the ancillary documents a registration can be done in 7 - 9 days. However, in practice a registration usually takes longer, a few weeks, because information is not readily available or it proves difficult to obtain certain signatures.

(C) Management

A local branch can be managed by the managing board members of the foreign entity or it can appoint a local manager and provide the manager with a continuous power of attorney to manage the company's affairs in the Netherlands. If the latter is the case an additional form will have to be completed to file the appointment and the power of attorney with the Chamber of Commerce.

1.11 Cooperation on a contractual basis

If it is considered to do business in the Netherlands an alternative to incorporating a B.V., acquiring a B.V. or opening a local branch can be to start cooperation with a local Dutch party on the basis of a cooperation agreement. For specifics with respect to commercial contracting we refer to chapter 3 of this book.

2. Employment relationships on the Dutch labour market

In the Netherlands, there are various contracts for the performance of work: the employment contract, the contract for services and the works contract.

For the characteristics of the employment contract see paragraph 2.2. It is characteristic of the contract for services that the contractor undertakes to the client to perform work in the nature of the provision of services other than under an employment contract. There is no relationship of authority between the client and the contractor. It is characteristic of contracting for work that the contractor undertakes to perform certain tangible work at a certain price, other than under an employment contract. In contracting for work there is no relationship of authority either.

Because there is no relationship of authority in relation to contracts for services and contracts for work, equality of the parties is assumed. The protective provisions of employment law therefore do not apply to these contracts. In relation to an employment contract, inequality of the parties is assumed. A large number of protective provisions therefore apply to these contracts. Think for example of protection from dismissal (see paragraph 2.4(I)) and continued payment of salary during illness (see paragraph 2.4(G)).

Despite the fact that employment law has many protective provisions, it can be argued that the Dutch labour market is flexible. There are ample possibilities to conclude fixed-term contracts and on-call contracts. The possibility to use temporary workers and payroll companies also contributes to a flexible labour market. Moreover, the rigidity of dismissal law is less than expected, contrary to the impression that is often aroused. There are many possibilities for companies to anticipate changed (commercial) circumstances in relation to their employees.

2.1 Work permit

The Dutch labour market is not automatically accessible to all employees. A restrictive admission policy applies. The Foreign Nationals (Employment) Act (*Wav*) contains a prohibition for employers to employ foreign nationals without a work permit. The starting point of this Act is that, in principle, an employer must apply for a work permit for any foreign national who is going to perform work in the Netherlands. This, however, does not apply to employees with the nationality of a country of the European Economic Area (EEA). The EEA consists of the countries of the European Union plus Norway, Iceland and Liechtenstein. In addition, employees with Swiss nationality may work in the Netherlands without a work permit. Employees from the Member States that joined the European Union on 1 January 2007 and 1 July 2013, respectively: Bulgaria, Romania and Croatia, are excepted. For the time being, a work permit for these employees must indeed be applied for. In addition to the work permit, employees have to provide for their own residence permits.

A work permit is required for all persons who perform work. A work permit must therefore be applied for as well for trainees, volunteers, freelancers, public servants and self-employed persons. A limit may be set per sector on the number of permits to be issued.

The Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*, also referred to hereinafter as '**UWV**') is the government body charged with issuing the permits. A permit is issued only after the employer has first made efforts to fill the vacancy for the particular job with an employee from within the EEA. This vacancy must first be reported to the UWV and must in principle have been open for at least 5 weeks before the UWV examines whether there is a basis for issuing the work permit. If the vacancy is difficult to fill, it must sometimes even have been open for 3 months. The UWV decides what vacancies are difficult to fill. If the UWV decides that the vacancy cannot be filled immediately or within a reasonable period of time with an employee from within the EEA, the UWV will examine whether the foreign employee has been offered the customary terms and conditions of employment and working conditions. In addition, it will investigate whether the employer has been previously convicted of an employment-related violation, such as violation of the Working Hours Act (*ATW*), working conditions legislation or the Minimum Wage and Minimum Holiday Allowance Act (*WML*).

If the employer obtains a permit following this investigation, it will be valid for three years. After the end of these three years, the employee will in principle be eligible for the endorsement 'work allowed without restrictions'. In that case, no work permit is required anymore. At present, a bill is pending that argues for limiting the validity period to one year and the requirement to apply for the permit again annually, for which the labour market has to be studied each time. In that case, an employer will first have to make efforts each time to fill the vacancy with an employee from within the EEA.

An employee who is put to work on the basis of a permit is entitled to the minimum monthly wage. This holds even if the employee only works part-time. In this way, the Dutch government wants to prevent improper use of public funds, such as unemployment benefit. The aforementioned bill also argues for wages on market terms. In that case a Romanian IT specialist, for example, would have to earn just as much as the average Dutch IT specialist. This wage is far above the minimum monthly wage. If an employer does not offer this, the UWV will have to refuse the permit.

In a number of cases no work permit is needed for employees from outside the EEA. An overview of this is given in **Schedule 2**. Sometimes, however, an obligation to notify applies. An obligation to notify entails a report to the UWV. In this context, please refer to point 9 of mentioned annex.

An employer that, contrary to the legislation, does not apply for a work permit risks a penalty of EUR 12,000 per employee. If it fails to comply with the obligation to notify, it risks a penalty of EUR 1,500 per employee.

2.2 Characteristics of an employment contract

An employment contract exists if one party, the employee, undertakes to perform work in the service of the other party, the employer, for pay for a certain period of time. Four requirements are therefore set on the existence of an employment contract: work, pay, for a certain period of time and a relationship of authority.

(A) Work

An employee must perform work himself/herself. The nature of the work is not relevant and does not have to be economically important. The work performed does, however, have to be productive for the employer. A trainee, for instance, does not perform productive work therefore no employment contract exists.

(B) Pay

The employer owes the employee payment as consideration for the work the employee has performed. Diverse forms of payment are allowed. In most cases the pay is determined in money. But other forms of payment such as payment in kind, a company house, shares and option rights are also allowed.

(C) For a certain period of time

This condition is of (very) minor importance. The law does not set a minimum. An employment contract can exist even if work is done for only a few hours.

(D) Relationship of authority

The requirement of a relationship of authority indicates that the employee must be subordinate to the employer. The employee must follow the employer's instructions. This does not mean that the employee cannot have a great degree of independence in performing his or her work.

To determine whether the aforementioned criteria have been met and an employment contract therefore exists, one must examine what the parties intended on concluding the contract and how they have performed this contract in practice.

There can also be a legal presumption of the existence of an employment contract. It exists if a person has performed paid work for another person for three consecutive months, weekly or for at least twenty hours per month.

2.3 Applicable law

Cross-border employment contracts are known as international employment contracts. To determine the rights of both the employer and the employee who is a party to such a contract, the applicable law has to be determined. With respect to employment contracts concluded after 17 December 2009, the applicable law is determined on the basis of the 'European Regulation on the Law applicable to Contractual Obligations' ('Rome 1 Regulation'). The law applicable to employment contracts concluded before that date (but after 1 September 1991) is determined on the basis of the EC Convention on the Law applicable to Contractual Obligations ('Rome Convention'). The choice-of-law rules in the Rome 1 Regulation and the Rome Convention are practically the same (but for one exception).

(A) Choice of law

In principle, individual employment contracts are governed by the law chosen by the parties. This choice may not, however, result in the employee being deprived of the minimum protection afforded to him or her by the mandatory provisions of the law that would have applied to him or her in the absence of a choice of law. Therefore, the objectively applicable law, the law that would have applied to the employment contract without a choice of law, will always have to be determined.

(B) Objective applicable law

The objectively applicable law is primarily determined by the law of the country where or, failing this, from where the employee habitually performs his or her work ('habitual country of employment'). If the habitual country of employment cannot be determined, the contract will be governed by the law of the country where the business is located that employed the employee. As an exception to both of these choice-of-law rules, it may follow from the whole of the circumstances that the contract is clearly more closely connected with a country other than the habitual country of employment or the place where the employer´s business is situated. In that case, the governing law is the law of the country where the clearly closer connection exists.

As stated above, the choice-of-law rules in the Rome 1 Regulation and the Rome Convention are the same, but for one relevant exception. The Rome Convention states only the *'country in which the employee habitually carries out his work'*. In the Rome 1 Regulation this is less clear-cut in the sense that it states the *'country in which or, failing that, from which the employee habitually carries out his work'.* This qualification (which implies a widening of scope) ensues from the case law of the European Court of Justice. The ECJ has confirmed that the objectively applicable law shall be determined as far as possible on the basis of the habitual country of employment and preferably not on the basis of the place where the employer's business is situated. The

place where the employer's business is situated is often less representative of the employment relationship than the country of employment.

In the Mackay II judgment, the Supreme Court of the Netherlands (*Hoge Raad*) held that the law applicable to the employment relationship could change over time if the circumstances on the basis of which the applicable law is determined change. This is inherent to the changing international employment relationships. In an employment contract with an IT specialist who is (each time) assigned to a different country after a number of years, a clear choice of law will have to be included. At the same time, the employer should be aware that some rights could change because of the close or closer connection with the country of employment.

(C) Mandatory statutory provisions

If the parties have included a choice of law in the employment contract, the mandatory provisions will still apply. These are provisions, which the country of employment considers so important for maintaining its public interests, such as its political, social or economic organization, that they have to apply to all employment contracts in the country of employment, irrespective of which law is applicable to the contract.

Mandatory provisions pertain to rules on safety and hygiene at the workplace, minimum wage, working hours, paid holiday, equal treatment and sick leave.

(D) International secondment

When employees from one EU Member State are posted to a company in another Member State, the Secondment Directive is applicable. Pursuant to Article 3 of the Secondment Directive, posted employees are at least entitled to the following terms and conditions of employment of the country of employment:

i. maximum working hours and minimum rest periods;
ii. minimum paid annual holidays;
iii. the minimum rates of pay, including overtime rates;
iv. conditions of hiring out of workers;
v. health, safety and hygiene at work;
vi. protective measures with regard to the terms and conditions for pregnant women or women who have recently given birth, of children and of young people;
vii. equality of treatment between men and women and other provisions on non -discrimination.

The Netherlands has widened the effect of this Directive in the Terms of Employment (Cross-Border Work) Act (Waga). The *Waga* also applies to employees from outside the EU. This means that at least the above-mentioned terms and conditions of employment apply to all employees posted abroad.

(E) Secondment and collective agreements

Foreign employees who are seconded to the Netherlands and who work on the basis of an employment contract under foreign law can, under certain conditions, rely on the collective agreement applicable at the receiving employer.

A collective agreement can be declared universally binding. Briefly, this means that it applies to all employers and employees who fall within the scope of application of the collective agreement. Under the law, foreign seconded employees may rely on the provisions governing rates of pay and holiday allowance and the minimum number of paid annual days' holiday pursuant to a collective agreement declared universally binding.

If a collective agreement has not been declared universally binding, the recipient must also apply the collective agreement applicable to it to seconded employees in relation to the working hours, including overtime, rest periods, night shift work, breaks, the duration of holidays and working on public holidays.

(F) No secondment and collective agreement

A foreign employee who works on the basis of an employment contract under foreign law cannot rely on the Secondment Directive or the Placement of Personnel by Intermediaries Act (*WAADI*) if he or she has not been seconded. The question is whether this makes a difference in the applicability of a collective agreement applicable to the Dutch employer. In the (scanty) case law on this, the applicability of a collective agreement to international employment contracts is made dependent on the question whether the employer operates on the Dutch labour market by way of the employment relationships in question. That will be the case if it has work performed in the Netherlands. Some legal scholars assert that the terms of collective agreements, which have been declared universally applicable, are part of the objectively applicable Dutch law (even though they are not legislation) and can set aside provisions of the chosen law. The Rome 1 Regulation allows for this, as the Regulation does not mention statutory provisions, but rules of the 'law'. The term 'law' is a broader term than the term 'act', so it could be argued that a foreign employee who works in the Netherlands pursuant to an employment contract under foreign law may rely on the mandatory terms of an applicable collective agreement.

An employer bound by an applicable collective agreement must apply it to all its employees (bound or not), irrespective of their nationalities. It could be successfully argued that if a foreign employee works pursuant to an employment contract under foreign law, the foreign law should give way if the a mandatory provision of the collective agreement is more favourable than the chosen law.

2.4 Performance of the employment contract

Under Dutch employment law, an employment contract is a contract without a prescribed form. This means that an oral as well as a written contract is applicable. This can be departed from in a collective agreement. A number of terms and conditions, however, have legal consequences only if they have been agreed in writing, such as a competition clause or a trial period stipulation. An employment contract exists only after the parties have reached agreement on its essential parts. Pay is viewed as the most essential part of an employment contract. Agreement always has to be reached on this in order for an employment contract to exist.

(A) Fixed-term / indefinite period

The starting point of Dutch employment law is that an employee commences employment for an indefinite period unless the parties agree otherwise. An employment contract for an indefinite period does not end by operation of law, unless it includes the stipulation that it will end when the employee is of state pension age. In all other cases, legally valid notice of termination of such employment contract is required. This is dealt with in more detail under I of this section.
A fixed-term employment contract can be entered into for a calendar-related period of time or, for example, for the duration of a project or during the maternity leave of the employee to be replaced. These employment contracts - apart from exceptions - end by operation of law[1].

Provisions on succession of fixed-term employment contracts

Pursuant to the provisions on succession of fixed-term employment contracts, an employment contract for an indefinite period may arise between the employer and employee if the employer and employee have concluded more than three fixed-term employment contracts and not more than three months have elapsed between the employment contracts[2]. In that case, the last employment contract counts as entered into for an indefinite period. This is also the case if the employer and employee have concluded several fixed-term employment contracts with each other and not more than three months have elapsed between the employment contracts and the total duration of these employment contracts, including the periods in between, has exceeded a period of 36 months[3]. After 36 months have elapsed, the last employment contract will count as entered into for an indefinite period. The provisions on succession of fixed-term employment contracts can be departed from in a

[1] Due to new legislation, as of 1 January 2015, employment contracts of 6 months or more, notice of termination has to be given one month before the contracts end, in default of which the employer will owe to the employee a penalty of one (pro rata) monthly salary.
[2] Due to new legislation, as of 1 July 2015 employment contracts succeed one another in the chain when the interval is less than six months, instead of less than three months.
[3] Due to new legislation, as of 1 July 2015 employment contracts succeed one another in the chain when the interval is less than six months, instead of less than three months and successive temporary employment contracts are converted into permanent employment contracts after the lapse of 24 months instead of 36 months.

collective agreement, such as in the collective agreement for the hotel and catering sector, in which the maximum number of successive fixed-term employment contracts is set at six and the maximum period at 60 months[4].

(B) Trial period

The parties can agree a trial period to 'try each other out'. It is not possible to agree a trial period with an employee whose skills for the specific job are presumed to be known by the employer. A trial period is not possible, for example, for an employee who had already worked at the same job as a temporary worker.

A trial period is legally valid only if it has been agreed in writing. This requirement of written agreement is also met if the applicable collective agreement contains a trial period clause.

The trial period is bound by a statutory maximum duration. In a fixed-term contract for less than two years, a trial period of one month at most is allowed[5]. If the contract is entered into for a term of more than two years or for an indefinite period, a trial period of two months at most is possible. The trial period must be the same for both parties. If these conditions of the trial period clause are not met, the trial period is then null and void in its entirety and may no longer be relied upon.

During the trial period, without the normal dismissal rules being applicable, both parties may terminate the employment contract. The oral or written notice of termination must have reached the other party before the end of the trial period. If so requested, the party terminating the employment contract must explain its reasons for doing so in writing. In that way, it can be examined whether the trial period might have been abused. This is the case, for example, if the reason for dismissal is discriminatory or that the employee proves to be ill.

(C) Working hours

Pursuant to the Working Hours Act (*ATW*), the general principle applies that in determining the pattern of working hours, an employer must take account of the employee's personal circumstances outside work; naturally in so far as this can reasonably be required of the employer. The Act contains the minimum standards within which the employee can be scheduled, such as rest periods, breaks of at least 15 minutes, night work, work on Sundays, the maximum number of hours the employee may work consecutively and on-call duty. A limited number of provisions may be departed from in a collective agreement (also referred to hereinafter as *CAO (collectieve arbeidsovereenkomst)*).

[4] Due to new legislation, as of 1 July 2015, the maximum period of which could be departed from, will be set at 48 months instead of 60 months.

[5] Due to new legislation, as of January 2015, no trial period will be possible in employment contracts for the duration of 6 months or less.

(D) Statutory minimum wage

The Minimum Wage and Minimum Holiday Allowance Act (*WML*) contains mandatory provisions on the lower limit of the wage to which the employee is entitled. The legislature determines the level of the statutory minimum wage twice a year. On 1 July 2013 the minimum wage was EUR 1,477.80 gross for employees aged 23 years and older. Any clause in the employment contract that stipulates that the employee will be entitled to less than the minimum wage is null and void. If the applicable collective agreement includes a higher wage than the minimum wage, the employer bound by it must pay at least this higher wage.

Additional minimum loan protection applies to on-call workers. On-call workers with whom a work period of less than 15 hours a week has been agreed and whose working times have not been specified are entitled to payment of at least 3 hours per call-up, even if they have worked less than 3 hours. The Act provides that an on-call worker who is called up, for example, to solve an acute software problem and is occupied with this for one hour must be paid for three hours.

At present, a bill has been submitted to allow the minimum wage also to apply to persons who work on the basis of a contract for services.

(E) Days' holiday

Each year, an employee may claim holiday of at least four times the agreed working hours per week. These are the statutory days' holiday. With a five-day working week, this comes down to 20 days' holiday per annum. Days' holiday are accrued during the period that the employee is entitled to pay. This means that the employee also accrues days' holiday during sickness and holiday.

Owing to a legislative amendment taking effect from 1 January 2012, different prescription periods and expiry periods apply to holidays. Days' holiday accrued before 1 January 2012 will become time-barred five years after the last day of the calendar year in which the entitlement arose. Statutory days' holiday accrued after 1 January 2012 will expire after a period of six months. If the employee could not reasonably have taken these days' holiday, however, the employer may not rely on this period. A prescription period of five years applies to days' holiday accrued after 1 January 2012 which exceed the statutory minimum.

With the employee's consent, certain days may be designated as days' holiday in departure from the law. For instance, the employer and employee may agree that sick days will be considered days' holiday for the purposes of the days' holiday exceeding the statutory minimum.

(F) Holiday allowance

Employees are entitled with respect to their employers to a holiday allowance of at least 8% of their pay. No holiday allowance is payable on several pay elements, including earnings from overtime and distributions from profit. An upper limit has been set on the pay on which holiday allowance is due. The limit is three times the applicable minimum wage. In practice, this is often departed from and holiday allowance is paid on the entire pay.

(G) Illness

During illness the employee retains the right to salary during the first 104 weeks. Pursuant to the law, the payment to be made must be at least 70% of the employee's salary up to a maximum of 70% of the daily pay as laid down in the Social Insurance (Funding) Act (*Wfsv*). The maximum daily pay as from 1 July 2013 is EUR 195.96 gross. In the first 52 weeks of illness the employee retains at least the right to the statutory minimum wage applicable to him or her. In practice, the obligation to continue paying the minimum loan is often departed from in favour of the employee. For instance, during the first year of sickness, the employer often continues to pay 100% of the employee's normal salary. Periods of illness are combined if they follow each other with an interruption of less than four weeks. The obligation to pay salary is excluded in some situations. This obligation does not apply, for example, in the case that the sickness was deliberately caused by the employee or the employee hinders or delays his or her recovery.

The employer and employee together are responsible for the employee's reintegration. Both parties are expected to do everything possible to allow the employee to reintegrate. In counselling sick employees, the employer must be assisted by an occupational physician or certified expert. The minimum efforts to be made by the employer, employee and occupational physician are strictly laid down. If reintegration in the employee's own job is not possible, it must be examined whether the employee can perform a suitable or adapted job. If reintegration at the employee's own employer is not possible, the employee must be reintegrated at another employer. If a dispute arises between the employee and employer during the employee's illness over the question whether the employee is still sick or not or whether suitable work is available or whether the employer or employee has done enough for reintegration, both the employer and the employee can request the Employee Insurance Agency to give an expert opinion (second opinion).

If the employee does not make sufficient efforts to re-integrate, the employer has the right to suspend the salary. If the employer does not make such efforts to a sufficient extent, the benefit agency (the Employee Insurance Agency) may decide to impose a sanction on the employer by extending the period in which the employer is obliged to continue paying the employee's salary. In that case, the employer will remain obliged to continue paying salary to the employee after 104 weeks of illness for another 52 weeks at most.

An employee who is still at least 35% ill after 104 weeks may be eligible for social security benefit from the government under the Work and Income (Capacity for Work) Act (*WIA*). The WIA consists of two schemes: the Income Scheme for those who are fully unable to work or are long-term disabled (*IVA*), and the Return to Work (Partially Disabled Persons) Regulations (*WGA*).

In the first two years of illness the employee is protected from dismissal. During this period the employer is subject to a prohibition of termination. This period is extended during the period that an extension of the period in which the employer is obliged to continue paying the employee's salary is imposed on the employer. If the employee does not cooperate sufficiently in his or her re-integration, the prohibition of termination may be blocked under certain conditions. If the employer wants to terminate the employment contract for a reason that is not related to the employee's illness (for example dismissal due to reorganization) there are possibilities during the first two years of illness to request the subdistrict court judge to set aside the employment contract.

(H) Pension

In the Netherlands there is no statutory right to pension. Nevertheless, a large sector of the Dutch working population has pension provisions on the basis of collective agreements (*CAO*s, see also paragraph 2.6(A)), mandatory sectoral pension funds and/or individual agreements between employers and employees.

(I) End of the employment contract

A fixed-term employment contract ends in principle automatically (by operation of law) when the period of time for which the employment contract was entered into has expired (the end date). An employment contract also ends automatically when the employee dies.

Employment contracts for an indefinite period do not end automatically. Action is required to terminate them[6]. This action can consist of notice of termination, setting aside the employment contract or concluding a termination agreement. An employment contract for an indefinite period can be terminated with immediate effect if there is an urgent reason to do so (summary dismissal). Both the employer and the employee may terminate the employment contract with immediate effect during the trial period.

Notice of termination

An employment contract for an indefinite period can end by notice of termination. The employee can give notice of termination of an employment

[6] Due to new legislation, as of 1 July 2015, employment contracts can be terminated without intervention of the UWV or the court on the grounds of attaining the pensionable age.

contract for an indefinite period at any time, with due observance of the notice period applicable to him or her. A fixed-term employment contract can be terminated in the interim only if this right has been agreed in writing for both the employer and employee.

In order to terminate an employment contract, an employer must have obtained prior permission from the Employee Insurance Agency (*UWV*)[7]. The UWV judges whether the intended dismissal by the employer is reasonable on the basis of the Extraordinary Labour Relations Decree (*BBA*). In principle, the procedure at the UWV is in writing. The employer submits a request for permission. After receiving the request, the UWV examines whether the employer's request is adequately substantiated. If there is adequate substantiation, the employee is given the opportunity to conduct a defence. A second written round is possible or, in exceptional cases, an oral hearing. If the UWV gives permission, the employer may proceed to terminate the employment contract. No appeal is possible against the UWV's decision.

If the employer terminates the employment contract, it must observe the correct notice period. The duration of the notice period for the employer depends on the duration of the employment contract. Under the law, the notice period is at least one month and at most four months. After permission has been obtained from the UWV, one month may be deducted from the notice period. The minimum notice period after deduction is one month.

In the event of a prohibition of termination, the employer cannot terminate the employment contract despite permission from the UWV. A prohibition of termination applies during the first two years of illness, pregnancy and if the employee is a member of the works council.

If the employer terminates the employment contract without having obtained the required permission from the UWV, the termination can be annulled. In that case the employee can claim reinstatement or continued payment of salary. If the employer or employee observes too short a notice period, this party will be liable for compensation.

The purpose and function of the Extraordinary Labour Relations Decree (*BBA*) is to protect the Dutch socio-economic relationships. Until recently, it was therefore assumed that if the employee did not fall back on the Dutch labour market after termination of the employment contract, the BBA would not apply. However, this viewpoint has now been superseded. In view of the increased importance of the European Union and the free movement of employees, protection of employees from unjustified dismissal deserves to be emphasized.

Despite the fact that the UWV has given permission to terminate the employment contract and the correct notice period has been observed, under

[7] Due to new legislation, as of 1 July 2015, there is no longer the option for a dismissal procedure via the subdistrict court or the UWV, but a prescribed procedure for each ground for dismissal. Dismissal for business-economic reasons and dismissal on the grounds of long-term incapacity for work only take place via the UWV.

certain circumstances termination can be manifestly unreasonable. A manifestly unreasonable dismissal exists *inter alia* if the dismissal takes place for a professed or false reason or when the termination could have too serious consequences for the employee in comparison to the employer's interest in the termination. The employee may claim compensation or restoration of the employment contract. So this concerns compensation and not a payment on the grounds of fairness. The judge may allow the obligation to restore the employment contract to lapse if the employer makes a buyoff payment.

Setting aside the employment contract

Both the employer and the employee can request the subdistrict court judge to set aside the employment contract for serious reasons[8]. Serious reasons are changes in the circumstances which are of such a nature that the employment contract must end or circumstances that would constitute urgent reasons if the employment contract were terminated forthwith.

Changes in circumstances mean *inter alia* business or organizational reasons, an employment conflict or unsatisfactory performance. An urgent reason means *inter alia* theft, embezzlement or rudely insulting or threatening the employer.

The subdistrict court judge checks as standard practice whether the termination request is connected with a prohibition of termination. If the subdistrict court judge establishes a connection, he or she will dismiss the request. This is otherwise only if circumstances arise that constitute serious cause to set aside the employment contract. This situation can occur, for example, if the employer wants to have an employment contract with a sick employee set aside for business reasons.

The proceedings to set aside an employment contract start with a request for termination. A hearing is held within four weeks. Prior to this, the other party can submit a statement of defence. The subdistrict court will issue its decision (the judgment) within a few weeks. No appeal is open against this decision.

What the UWV cannot do, the subdistrict court can, namely award a payment based on the ground of fairness. The level of this payment is determined in most cases on the basis of the subdistrict court formula[9]. The subdistrict court formula is only a guideline for subdistrict court judges and not a law.

The subdistrict court formula reads A x B x C. The A factor stands for the

[8] Due to new legislation, as of 1 July 2015, there is no longer the option for a dismissal procedure via the subdistrict court or the UWV, but a prescribed procedure for each ground for dismissal. Only dismissal for personal reasons, after refusal of the UWV or termination of a fixed-term contract without termination clause could be effected by the subdistrict court.

[9] Due to new legislation, as of 1 July 2015, there will be a transition payment for everyone who has been employed for more than 2 in case there is involuntary dismissal. This also applies to temporary employment contracts that cannot be renewed. Breakdown of payment: one-third of a monthly salary per service year and half a monthly salary per service year the employee has been employed for more than 10 years. A maximum gross amount of 75,000 euros or one annual salary applies if it exceeds a gross amount of 75,000 euros. Up to 2020 a transitional scheme applies to employees of 50 years or older who have been employed by the employer for at least 10 years. The current fair remuneration (subdistrict court formula) will lapse after the transition payment has been introduced, but the subdistrict court will be enabled to award an additional payment to employees when the employer acted in a seriously reproachable manner.

number of weighted years of service taken into account. The years of service until the 35th year of life count as 0.5. The years of service between the 35th and 45th years of life count as 1, the years of service between the 45th and 55th years of life as 1.5 and the years above the 55th year of life as 2.

The B factor is the remuneration factor. This factor is calculated on the basis of the gross monthly salary, plus in any case fixed, agreed salary components, such as holiday allowance, a fixed thirteenth month, a structural overtime allowance and a fixed shift work allowance. A bonus is part of this factor if it is substantial and structural. Barring very exceptional cases, the employer's contribution to the pension premium and the company car do not count towards the B factor.

The C factor is the correction factor. If the ground for setting aside the employment contract is completely within the control of the employer and there is no culpability, the C factor is equal to 1. If the ground for setting aside the employment contract is completely within the control of the employee, without any culpability being involved, then C is equal to 0. If there is culpability on the part of one of the parties, or reciprocal culpability, the gravity of the blame is expressed in the C factor. Other special circumstances of the case, such as the employer's financial position or the different labour market position of the employee, are also expressed in the C factor.

Conclusion of a termination agreement

The parties can terminate an employment contract by reaching consensus. The conditions under which the employment contract ends are set out in a settlement agreement. Permission from the UWV is not required and the termination conditions are not applicable. The settlement agreement is drafted in such a way that the employee's social security rights are safeguarded as far as possible[10].

Termination can have far-reaching consequences. Consequently, the employer may not trust too readily that the employee has accepted an offer to terminate the employment contract. The employer is subject to an obligation to provide information and investigate, and the statements or behaviour of the employee must be clear and unambiguous and demonstrate his or her consent. If this is not the case, the employee can invoke annulment of the settlement agreement.

If a settlement agreement is concluded between the employer and employee, depending on the facts and circumstances, it is customary that severance pay is awarded in accordance with the subdistrict court formula and a notional notice period is compensated.

The notional notice period ensues from the Unemployment Insurance Act

[10] Due to new legislation, as of 1 July 2015, termination of the employment contract with mutual consent can be reversed by the employee in writing within two weeks after concluding the settlement agreement without stating reasons. The same applies if the employee has terminated the employment contract himself.

(*WW*). The duration of the notional notice period is the same as the notice period applicable to the employer. During this period any right to unemployment benefit is suspended. To compensate the notional notice period, the termination date can be deferred or additional severance pay can be paid. If the termination date is deferred, the notional notice period will fall within the period of employment during which the employee is entitled to salary.

Summary dismissal

If there is urgent cause, the employer or employee can terminate the employment contract with immediate effect. This is summary dismissal. The customary termination stipulations are not applicable. In order to effect a summary dismissal (i) there must be urgent cause, (ii) the urgent cause must be stated simultaneously with the dismissal and (iii) dismissal must have taken place immediately.

Urgent cause for the employer is considered to be such acts, characteristics or behaviour of the employee that, in consequence, the employer cannot reasonably be required to allow the employment contract to continue any longer. Examples are theft, embezzlement, deceit or other serious offences.

Urgent cause for the employee is considered to be such circumstances that in consequence, the employee cannot reasonably be required to allow the employment contract to continue any longer. An example is if the employer grossly ignores the obligations imposed on it by the employment contract.

Summary dismissal is the most serious legal remedy in employment law. The employer's obligation to pay salary stops with immediate effect and an employee who is summarily dismissed will not be eligible for unemployment benefit. The legal validity of a summary dismissal is therefore not easily assumed.

The employee has six months in which to invoke the nullification of the summary dismissal. If the court finds in favour of the employee, the employer must still pay the employee's full salary with retroactive effect. To avoid the risk of a high salary claim of the employee, the employer would be wise to request the subdistrict court to set aside the employment contract conditionally as soon as the employee has made him or herself available to perform work (setting aside the employment contract in so far as required).

Collective dismissal

Collective dismissal is where 20 or more employees are dismissed for commercial reasons within a period of three months in the territory of the UWV. The manner in which these dismissals are effected (termination, setting aside, mutual consent) is not relevant to the number of 20. The employer must inform the UWV and the trade unions in advance of an intended collective dismissal. The employer must also consult with the trade unions and the works council. The aim is to prevent unemployment and

facilitate consultation with the employees' representatives about the intended dismissals.

Managing director under the articles of association

The managing director under the articles of association often has a company as well as an employment relationship with the company (private limited company (B.V.) or public limited company (N.V.)). The protection from dismissal afforded to an employee, however, goes beyond the protection afforded to a managing director. The main rule is that the general meeting of shareholders (GM) is authorized at all times to dismiss. The powers of the GM are nevertheless limited by the law and articles of association. Another main rule is that a decision on dismissal by which the company relationship is ended automatically ends the employment relationship. This is otherwise only in the event of a prohibition of dismissal or if different agreements have been made.

(J) Social Agreement

In April 2013, the government and the social partners (employers' and employees' representatives) concluded a Social Agreement. The aim is to give as many people as possible a chance to obtain work and economic independence through a structural approach to the economy and labour market. One of the targets is, on the one hand, to reform dismissal law and, on the other, to strengthen the position of flexible workers. If the intentions of the government and social partners are converted into laws and regulations, dismissal law will be essentially different from 2016 and severance pay will be decreased.

2.5 Transfer of a business

Takeovers of businesses are an everyday occurrence. If a business is transferred, all rights and obligations under an employment contract between an employer and employee pass to the acquiring employer by operation of law. This ensues from a European directive that has been implemented by the Netherlands. If the company has set up a works council, the works council has the right to prior consultation if the company wants to transfer its business (see paragraph 2.6(A)).

A business is transferred when an economic unit is transferred as a result of an agreement, merger or division and maintains its identity in this process. This does not include transfer purely as a result of a share transaction in which the person of the employer does not change. There has to be a transfer of business activities, such as the transfer of buildings, machinery and equipment, software, customers, permits, knowhow and goodwill. It is important that the identity of the economic unit is maintained after the transfer.

(A) Labour intensive or capital intensive

The criteria applicable to establishing the maintenance of identity may vary from sector to sector. In this context, two types of sectors can be distinguished: the capital-intensive and the labour-intensive sectors. A catering company, for example, is viewed as capital intensive and a cleaning company as labour intensive. In the Netherlands, the IT sector is considered predominantly labour intensive. This is in contrast to Belgium, for example, where the IT sector is considered capital intensive.

In a labour-intensive sector the transfer of an essential number of personnel (with respect to number and expertise) is an important indication that a business has been transferred. This holds even if no means of production at all have been transferred. If we apply this fact to the outsourcing of IT services, it will quickly be clear that a transfer of a business is taking place if a large number of personnel are transferred to the (new) service provider. This means that the rest of the personnel working in the transferred IT services will be transferred as well, while retaining all rights they have accrued, such as seniority, salary level, number of days' holiday, rights under the prevailing collective agreement, right to a leased car etc. It should be noted that temporary workers and seconded employees are not transferred by operation of law. If IT services are outsourced without personnel also being transferred, a transfer of business is not likely to be involved. This is unlike the United Kingdom, for example, where any change to the provision of services is considered a transfer of business, regardless of whether the identity of the transferred unit is maintained or not.

(B) Obligation to provide information

The transferring employer must inform its employees correctly and fully about the legal consequences of the transfer of business. The employees must, after all, be able to take well-considered decisions on whether they are transferred to the acquiring employer or whether they relinquish that possibility and the corresponding rights. If an employer has a works council or an employee representative body (*PVT*), they must be informed in good time before the decision to transfer the business is taken. The works council has a right to prior consultation in that context. If an employee participation body is involved, this body – together with the employer – will usually inform the employees about the consequences the transfer will have for them.

(C) Prohibition of dismissal and liability

The transfer of business may never be a reason for either the transferring or acquiring employer to terminate an employment contract. A prohibition of dismissal applies by law.

Until one year after the transfer of business, the transferring employer, in

addition to the acquiring employer, is still jointly and severally liable for compliance with the obligations that arose before the transfer. During that year, an employee can file a claim against both legal entities, for example in case of overdue salary.

2.6 Trade unions and participation

Individual freedom to contract between employers and employees is the starting point of the Dutch law of obligations. This individual freedom to contract is limited, though, not only by mandatory statutory provisions but also by the trade unions and participation bodies.

(A) Collective agreement (CAO)

Trade unions can limit the individual freedom to contract of employers and employees by concluding a collective agreement (*CAO*). In this way, employees are provided with additional protection. The aim of this is to balance the unequal power relationship between employers and employees.

In the Netherlands, approximately 80% of the employees come under a collective agreement. Employers bound by membership of an employers' association are required to apply the CAO to all their employees, thus also to the employees who are not members of a trade union or other association. Employers that are not bound may also be required to apply the CAO if the Minister of Social Affairs and Employment has declared the CAO universally binding. Departure from the CAO is not allowed, even if an employee has consented to this. This is otherwise only if a minimum CAO is concerned and a departure is to the advantage of the employee. A CAO can be concluded for a sector or branch of industry or business and mainly contains terms and conditions of employment.

Trade unions are often involved as well in concluding a redundancy plan. A redundancy plan contains measures and schemes that assist employees in dealing as best as possible with the consequences of a reorganization. An employer can also conclude a redundancy plan unilaterally or together with the works council. The binding force is, however, strongest if the redundancy plan is concluded in writing with the trade unions involved. In that case, the employer must assume that a subdistrict court judge will also follow the redundancy plan, unless it would have an obviously unfair outcome.

In the event of a collective dismissal, the employer is subject to an obligation to consult with the trade unions.

The right of employees to act collectively, including the right to take collective action in conflicts of interest ensues from European laws and regulations. Collective actions are allowed in cases of conflicts of interest between employers and employees, the right to take collective action is an ultimate remedy and collective action is not in conflict with previously made agreements in collective agreements. The impression that strikes take place

frequently in the Netherlands is unjustified.

(B) Works Council

An entrepreneur who operates a business employing at least 50 persons is required to set up a works council. A works council has a dualistic function, namely to hold consultations with the entrepreneur and to represent the employees with respect to the entrepreneur. Both the entrepreneur and the works council must contribute to the proper functioning of the business.

The works council is composed of members who are elected directly by persons employed at the company from their ranks. The number of members depends on the number of persons employed at the company. The members of the works council step down at the same time every three years. Membership of the works council ends automatically when employment ends.

Consultations between the entrepreneur and the works council take place during consultative meetings. During these consultative meetings matters concerning the company are brought up for discussion regarding which either the entrepreneur or works council considers consultation desirable or about which consultations must be held by law. In this context one should think of social, organizational, financial and economic matters. Furthermore, at least twice a year the general course of business in the company must be discussed during a consultative meeting.

Two important special rights of the works council are its right to prior consultation and its right of consent.

The right to prior consultation relates to major intended financial, economic and business decisions. Examples are intended decisions to transfer (the control of) the company, discontinuation of (part of) the activities of the company, major changes in the organization of the company and making an important investment for the benefit of the company. The entrepreneur must ask the works council for advice at the time the decision-making is still in the preparatory stage. By way of its advice, the works council must be able to exert influence on the entrepreneur's decision-making.

The entrepreneur must present the decision to be taken to the works council in writing. The works council is provided with a list of the grounds for the decision, its consequences for the employees and the measures to be taken as a result of it. Before the works council gives advice, a consultative meeting must have been held at least once.

After the works council has given its advice, the works council is informed of the entrepreneur's decision as soon as possible. If the entrepreneur's decision is not in accordance with the advice of the works council, the entrepreneur must suspend its decision for a month. Within this month, the works council can appeal to the court (the Enterprise Division of the Amsterdam Court of Appeal) against the entrepreneur's decision. This appeal can be brought only if the entrepreneur could not reasonably have reached its decision in weighing

up the interests involved. The judge may rule that the entrepreneur could not reasonably have reached the decision in weighing up the interests involved. The judge may also impose the obligation on the entrepreneur to withdraw all or part of the decision and undo its consequences or impose a prohibition on the entrepreneur from taking actions (or having them taken) to implement the decision.

The right of consent relates to the company's social policy. Examples are intended decisions to adopt, change or withdraw a scheme concerning pension insurance or a profit-sharing scheme, a remuneration or job assessment system or a scheme relating to appointment, dismissal or promotion policy. The right of consent does not relate to pay and hours. The procedure to obtain consent is the same as that of the request for advice.

The consent of the works council is not required if the matter in question has already been substantively regulated in a collective agreement.

A decision subject to consent cannot be taken without the consent of the works council. If the entrepreneur has not obtained the consent of the works council, the entrepreneur may request substitute consent from a judge (subdistrict court judge). The judge will give substitute consent only if the decision by the works council not to consent is unreasonable or the intended decision of the entrepreneur is required for serious organizational, commercial or business-related social reasons.

The entrepreneur must ask the works council for advice at the time that the decision-making is still in the preparatory stage. By giving advice, the works council must still be able to exert influence on the entrepreneur's decision-making.

The entrepreneur must present the decision to be taken to the works council in writing. The works council is provided with a list of the grounds for the decision, its consequences for the employees and the measures to be taken as a result of it. Before the works council gives advice, a consultative meeting must have been held at least once.

(C) Employee representation

Companies with at least 10 but fewer than 50 employees can form an employee representative body (*PVT*). An employee representative body is composed of at least three persons who are elected directly from the persons employed at the company. The election is held by way of secret ballots. If a majority of persons employed at the company so request, the entrepreneur must establish an employee representative body.

The rights of the employee representative body are much more limited than those of the works council. This limits its influence on company policy. The advice and consent procedures are only partially applicable.

(D) Staff meeting

Companies with at least 10 but fewer than 50 employees for whom no works council or employee representative body has been established are required to hold staff meetings. These meetings must be held at least twice a year. The meetings deal with matters that concern the company and the position of the employees and the general course of business of the company. In the event of intended decisions with major consequences for the employees, the staff meeting must be asked to give advice.

2.7 Liability of the employer

The employer must provide a safe working environment for its employees and must prevent employees from suffering injuries in performing their work. In this context, the employer must adopt an active attitude and analyse what risks occur and how employees can be protected against them. The employer must take account of the experiential fact that in performing their daily work, employees can lose sight of the necessary caution and no longer see certain dangers.

Special provisions apply to division of the burden of proof. The employee must prove that he or she has suffered personal injury, what the extent of the injury is and that there is a connection between the injury and the performance of the work. If the employee succeeds in doing so, the employer will be liable unless it has complied with its duty of care, the injury did not result from its failure to observe its duty of care or the injury was due largely to the intent or wilful recklessness of the employee. There is no strict liability. The employer does not breach its duty of care if it does not warn against generally known dangers that are necessarily involved in performing the work.

In the event that injury is due to an occupational illness, the employee must prove that he or she was exposed to hazardous materials and he or she is suffering from an illness that can be caused by such exposure.

If an employer has work performed in the practice of his/her profession or running of his/her business by a person with whom he/she has not concluded an employment contract (hired-in employees), the employer is also liable for any injury this person suffers in performing his or her work. For such liability, it is necessary that the work performed by the hired-in employee is part of the hirer's activities. The work does not, however, have to be considered part of the 'essence' of the hirer's profession or business operations. The aim is to afford protection to persons in a position comparable to that of an employee as far as the duties of care to be observed by the employer are concerned. These must be persons who are partly dependent on the person for whom they perform the work to provide for their safety.

It is important that the employer is required to insure its employees properly against personal injury arising from traffic accidents in the performance of the work. This holds for motorized and non-motorized participation in traffic, but (for the time being) not for one-sided accidents of pedestrians on the public road. If

the employer is remiss in complying with this obligation to insure, it will be liable to the employee for the missing benefit to which the employee would have been entitled on the basis of proper insurance.

2.8 **Proceedings**

In procedural employment law, the following three types of proceedings predominantly occur: court proceedings commenced by a summons, court proceedings commenced by an application and dismissal proceedings before the UWV. In addition - to a lesser degree - there are mediation and arbitration procedures if the parties have agreed this or appeal proceedings before a dispute resolution committee if this is stipulated in a collective agreement or other applicable regulations. The latter procedures are not dealt with in this book because these specific procedures do not occur frequently.

(A) Court with jurisdiction

Briefly, Dutch courts have jurisdiction to hear an employment dispute if the work is habitually performed in the Netherlands or if the defendant resides or is staying in the Netherlands. Pursuant to the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels 1 Regulation), an employee may only be summoned before the court in his or her place of residence. An employee residing in Belgium who works in the Netherlands may therefore be summoned only in Belgium. After the dispute, however, the parties can make different, written agreements on this.

In almost all employment law cases, the subdistrict court of the district court is the designated court. The subdistrict court does not have jurisdiction in issues relating to an employee who is managing director under the articles of association of a private or public limited company. In that case the civil sector of the district court has jurisdiction.

It may be stipulated in a collective agreement that a dispute must first be brought before a disputes resolution committee. Failure to observe this can result in the subdistrict court not hearing the case.

(B) Court proceedings

The most frequently occurring employment law proceedings at Dutch courts concern requests to set aside an employment contract, salary claims (accompanied or not by a request for reinstatement), suspension of the non-competition and/or non-solicitation clause, manifestly unreasonable dismissal proceedings and claims based on employer’s liability.

Prior to the start of the court proceedings, the claimant or applicant must pay a court fee. This must be paid to the court in a timely manner. The amount of this fee depends on the type of proceedings and the financial interest involved

in them.

(C) UWV procedure

Besides the above-mentioned court proceedings, the UWV procedure is also a frequently occurring employment law procedure. The employer may request the UWV to give permission to terminate the employment contracts with one or more employees. The General Administrative Law Act (*Awb*) as well as the Dismissals Decree are applicable. The UWV branch in the place where the employee habitually performs his or her work has jurisdiction to hear the request for dismissal. The employer must substantiate in detail by way of documents why it wants to terminate the employment contract. The employee is then given the opportunity to conduct a defence against this. As soon as the UWV has sufficient information available, the Redundancy Committee will give a decision on the request for dismissal.

If permission is given because of commercial circumstances, the UWV may attach the so-called reinstatement condition to such permission. This entails that the employer is not allowed to take on a new employee for the job of the dismissed employee within 26 weeks after permission has been given. No appeal is possible against the decision of the UWV. A complaint can, however, be submitted to the National Ombudsman against the action taken by the UWV. After the UWV procedure, the employee has the possibility to claim compensation before the subdistrict court if he or she is of the opinion that the dismissal was manifestly unreasonable. This is in contrast to the situation in which the employment contract is not terminated, but is set aside by the subdistrict court judge. In that case it is no longer possible for an employee to claim compensation. It is in fact assumed that the subdistrict court judge has already taken this into account in his or her decision on setting aside the employment contract and awarding dismissal compensation, if any. Appeal against a decision to set aside an employment contract is not possible either, unless the subdistrict court judge has gone beyond his or her jurisdiction. The latter will not easily be the case[11].

(D) Equal Treatment Commission (CGB)

Finally, the Equal Treatment Commission was formed pursuant to the Equal Treatment Act (*AWGB*). The duty of this commission is to examine whether the employer has made a prohibited distinction, for example on the basis of gender, religion, race, personal convictions, age or chronic illness. A procedure before the Equal Treatment Commission is free of charge and is open to aggrieved parties and stakeholders, such as trade unions. The Equal Treatment Commission does not give binding opinions and the procedure can run in addition to judicial proceedings. A decision of the Equal Treatment Commission can have influence on court proceedings.

[11] Due to new legislation, as of 1 July 2015, appeal and cassation become possible for both procedures (court proceedings and UWV procedure).

3. Commercial contracts

Introduction

The Dutch Civil Code (*DCC*) and decades of jurisprudence based on it are the basis and sometimes prescription for the assessment, drafting, negotiation, performance and termination of commercial contracts subject to Dutch law. The general principles and rules applicable to entering into and performing agreements incorporated in the DCC include rules such as to how and when an agreement is reached and validly executed, what the grounds are for nullity and annulment, and also include breach, default, default notices, liability, termination, consequences of termination, legal validity and applicability of general terms and conditions and so forth. A few of these general principles are described below.

For some agreements, more specific rules are incorporated in the DCC such as with regard to sale of goods (*koop*), lease (*huur*), e-commerce, agency (*agentuur*), security (*borgtocht*), a settlement agreement (*vaststellingsovereenkomst*), professional services (*opdracht*) and construction (*aanneming van werk*), some of which are based on EC Directives and EC Regulations and therefore comparable with rules and regulations in other EC countries. Some agreements such as licensing of software are not incorporated in the DCC and in such cases only the general rules and principles in the DCC apply together with the rules set in the jurisprudence. The most common of the agreements that are part of the DCC, are described in de second part of this chapter. In the first part some general principles are described that apply to all kinds of commercial contracts. In B2B agreements most of the principles and rules incorporated in the law are regulatory law.

3.1 Some general principles

(A) Form free

Except for specific agreements (such as an agreement to transfer title to copyrights or real estate), agreements are form free: an agreement is valid whether executed orally, in writing, by e-mail or online: it will above all be a matter of (the burden of) proof what the contents of an agreement are when an agreement is not executed in writing. In Dutch the word ‘agreement’ (*overeenkomst*) is used as a general concept and the word ‘contract’ (*contract*) for written agreements; however there is no legal definition. Hereinafter both words are used as synonyms.

(B) Reasonableness and fairness

One of the basic and general principles applicable to all commercial contracts and the performance thereof is the principle of reasonableness and fairness (Sections 2 and 248 of Book 6 DCC). This principle of reasonableness and fairness applies in two ways: (i) it can limit the applicability of specific rights

that parties have agreed, when exercising such rights would be unacceptable according to standards of reasonableness and fairness (*beperkende werking*) and (ii) it can have legal effects that are not stipulated in the agreement (*aanvullende werking*). The principle of creating additional legal effects (*aanvullende werking*) is a more open rule; the nature of the agreement, the interests of both parties and the specific circumstances of the case could create certain obligations, such as an obligation to compensate for damages that are not specified in the contract. For example, depending on the circumstances of the case and by exception, not as a rule, when an agreed notice period would not adequately cover the legitimate interest of the other party, the notifying party could be obliged to compensate for damages nonetheless. This could be the case when the other party, in the *legitimate expectation* the agreement would *continue*, for example, has made a substantial investment, which could not be recouped during this notice period.[12]

The limitation of contractual rights (*beperkende werking*) can only be applied in exceptional circumstances: executing such rights by a party has to be *unacceptable* according to the standards of reasonableness and fairness. *All* circumstances of the case – before and upon entering into the agreement and during performance - are relevant if this is the case and the interests of both parties have to be taken into account. It is generally understood that parties cannot contractually waive the principle of reasonableness and fairness that can limit the applicability of a contractual provision.
The principle of reasonableness and fairness can therefore create an obligation to compensate for damages, for example, or oblige a party to apply a longer notice period than agreed and is therefore to be seriously taken into account when contracting under Dutch law. The principle is primarily applied based on the circumstances of the case. It will be for the court to determine if and to what extent this principle applies on a case-by-case basis. The jurisprudence with regard to this principle is extensive and offers few 'golden rules' that can be generally applied. A contract is therefore not always what it seems.

(C) Haviltex rule

Another relevant principle to take into account when contracting under Dutch law is a principle established by the Supreme Court[13] and known as the 'Haviltex-rule'. This rule is applied when parties to a commercial contract have a different view on the meaning of a clause and how it should be interpreted (and therefore have a different view on the contents and extent of an obligation, for example). In short, the Supreme Court ruled that to answer the question what the parties have agreed and meant to agree and if the agreement has a gap that needs to be filled, not only the pure semantic meaning of the provisions of the agreement are relevant, but all circumstances of the particular case. To answer this question it is relevant to know what the

[12] Supreme Court, 21 juni 1991, *NJ* 1991, 742, *Mattel / Borka*.
[13] Hoge Raad, 13 maart 1981, *NJ* 1981, 635, *Haviltex.*

parties, taking into account all relevant circumstances of the case, could have reasonably meant by those provisions and what they could have reasonably expected from each other. To this extent each of the party's social position (large or small company for example) is relevant too as well as the legal knowledge the parties can be expected to possess.

In the open and internationally oriented Dutch economy, commercial contracts are often written in the English language. This causes interpretation problems if one considers the substantial differences between Dutch law and the Anglo Saxon law systems. Most common examples relate to terminology such as 'termination' or 'liquidated damages' or 'breach'. Such contracts are furthermore often influenced by principles of law that are common in the US or in the UK, such as an entire agreement clause, that are unusual or unknown in the Netherlands. This causes additional interpretation problems. Contracts under Dutch law which are written in English should therefore always be checked, and to the extent necessary modified, by an experienced Dutch lawyer who knows the differences.

(D) Breach and default

The principles and rules applicable to breach of contract (*tekortkoming*), default (*verzuim*), liability based on breach of contract (*contractuele aansprakelijkheid*), damages (*schade*) and termination (*ontbinding*) are all incorporated in the DCC. In B2B agreements, these rules and principles are regulatory law. The principle that a court can always moderate agreed penalties or fixed damages (*boete*) is a rare but relevant example of an exception to this rule.

Any non-compliance with contractual obligations constitutes a breach of contract (*tekortkoming*). The breach can be attributable or non-attributable. A non-attributable breach [*niet toerekenbare tekortkoming* or *overmacht*] can best be translated as 'force majeure', being circumstances beyond a party's reasonable control. Force majeure entitles the other party to terminate (*ontbinden*) the agreement or, to suspend its obligations, amongst other things, but (in principle) does not constitute an obligation for the defaulting party to compensate for damages. In the DCC there is no list of circumstances that are considered force majeure. Force majeure is outlined in jurisprudence and therefore influenced by the circumstances of the case. Parties are free to agree and stipulate which circumstances they consider to be non-attributable (force majeure) and/or which they consider attributable (breach).

Based on the Dutch Civil Code, in case of an attributable breach (*toerekenbare tekortkoming*) the other party is entitled, amongst other things to suspend performance of its obligations, while the other party can claim compensation of damages and can terminate (*ontbinden*) the agreement. However, if the breach can still be repaired a default notice (*ingebrekestelling*) is required in which the defaulting party is allowed a reasonable period of time to repair. The default notice has to be specific in terms of reference to the obligation that is not met and the period of time to repair, in order for the alleged defaulting party to respond adequately. The

breaching party will be in default (*verzuim*) when the breach is not repaired in time; only once the breaching party is in default (*verzuim*) can the agreement be terminated (*ontbonden*) and compensation of damages (*schade*) claimed. As with everything in life, there are of course exceptions to this rule. The most relevant ones are that a default notice is not required in case the breach cannot be repaired either temporarily or permanently, in case the party in breach makes clear it *will* not repair (which could be the case if such party specifically denies being in breach and does not take any action to follow up on the default notice), or when is it clear (objectively) that the breaching party will not repair.

(E) Liability for damages

The DCC also provides a definition of damages (*schade*) and a set of rules that apply to compensation for damages, each party's obligation to minimize and prevent damages and the consequences of a party's own fault on the defaulting party's obligation to compensate for damages. Based on the law *all* damages suffered by a party as a consequence of the other party's breach have to be compensated. Damages are defined as injury, death, material damage [*zaakschade*] and financial loss, such as loss of profits, costs to prevent or limit damages and loss, costs to determine the damages and loss and reasonable costs for out-of-court settlement. Attorney fees relating to legal proceedings and their preparation are excluded (except in case of intellectual property infringements): such costs are fixed by law and usually cover only a fraction of the real costs. The law does not distinguish between indirect, consequential and direct damages and does not provide for a definition. Therefore a defaulting party has to compensate all sorts of financial damages such as loss of profits, income or turnover, costs, costs of idle time (whether personnel or machines), costs invoiced by third parties, loss of income as a result of the premature termination (*ontbinding*) of an agreement, costs and loss resulting from late delivery, etc. etc. The party claiming damages will have the burden of proof with regard to the causality with the breach and the exact amount of the damages (in B2C agreements and in case of product liability the burden of proof can be reversed). As mentioned above, parties can agree otherwise and with regard to indirect and consequential damages this is often done in the liability clause by specifically excluding liability for such damages. However it is often forgotten to specify and define what 'direct' and 'indirect' damages are which will turn the liability clause into a liability.

(F) Termination

A party can terminate (*ontbinden*) an agreement by written notice to the other party in case of default (*verzuim*) of the other party and when the severity (*ernst*) of breach justifies termination; termination is considered to be a ' last resort' remedy. If the breaching party contests the legitimacy of the termination (for example: claiming there is no breach or no default or the severity of the breach does not justify termination), it can challenge the termination in court, for example by demanding performance of the

agreement by the other party (payment of invoices, for example) or claiming damages based on unlawful termination by the other party. Termination is also possible by a decision of the court based on a legal claim to this extent.

The consequence of termination (but this too is regulatory law) is the obligation of the parties to undo what has been performed or delivered ('money back, goods returned'). If this is not possible, such as in case of professional services, the obligation to undo is replaced by an obligation to compensate the value of the deliverable. The value of the deliverable is determined by its value for the other party at the time of receipt; parties are likely to disagree about this value: the defaulting party will probably state the value equals the amount on the invoice, the other party will argue the value was less or zero. The judge will ultimately decide.

In Anglo Saxon law the word 'termination' can apply to both termination for cause as well as termination for convenience. Under Dutch law different wording is used and the legal regimes differ substantially. Under Dutch law termination based on breach (or for cause) is referred to as '*ontbinden*' and termination for convenience or without cause, as '*opzeggen'*. The termination for convenience, for example, does not result in an obligation to undo or compensate for damages (notwithstanding the exceptions to the rule) and apart from the fact that termination for convenience is subject to the general legal principle of reasonableness and fairness too, termination for convenience is not incorporated in the DCC, whereas termination for cause is.

(G) Warranty (garantie)

Warranty (*garantie*) is not a term defined by law. Therefore parties to a contract need to define the meaning of the warranty. They also need to specify the intended legal consequences: will a party be in default without a default notice being required? Is the consequence of a breach of a warranty an unlimited indemnification or is the warranty subject to the limitation of liability clause? Does a warranty constitute an obligation of result that always obliges the party to perform except in case of force majeure?

(H) Entire agreement clause

In Anglo Saxon law the entire agreement clause aims to limit the rights and obligations between parties to the provisions written in the contract. This principle is not recognized as such under Dutch law. The 'entire agreement' clause incorporated in contracts under Dutch law has been subject to several Supreme Court cases already, the latest one dating from March this year. In two decisions in 2007[14], by applying the Haviltex rule, the Supreme Court considered the semantic meaning of the contractual provisions and the most likely meaning of the English terminology under Dutch law (such as with regard to the 'termination' clause) the most relevant for the interpretation of

[14] HR 19 januari 2007, JOR 2007/166, Meyer Europe BV/PontMeyer B.V.; HR 29 juni 2007, JOR 2007/198, Derksen/Homburg); Hof Leeuwarden 29 mei 2012, ECLI:NL:GHLEE:2012:BX0321, RUG / Nano-C (Westwood, Massachusetts, USA).

the commercial contracts in these cases, taking into account the following circumstances: professional parties, assisted by legal experts, big transaction, detailed contract *and* …. an entire agreement clause.

In the latest ruling by the Supreme Court[15] relating to an entire agreement clause, the Court considered that an entire agreement clause *can* be relevant to the interpretation of an agreement in which it is incorporated, however the meaning of such a clause depends on *all* circumstances of the case, such as the wording of the clause, the nature, contents, purpose and scope of the agreement, the level of details of the agreement, if and how the entire agreement clause has been discussed during contract negotiations and how it has become part of the agreement. The Supreme Court explicitly considered that the entire agreement clause as such has no specific meaning under Dutch law and that the meaning of a provision in a commercial contract in which an entire agreement clause is incorporated can still be explained and interpreted based on what the parties have said to each other or what the parties have done before they entered into the agreement.

(I) Unforeseen circumstances

A party can try to renegotiate agreements (or partly terminate these) relying on unforeseen circumstances (Section 258 of Book 6 DCC) if, further to principles of reasonableness and fairness, it would be unacceptable to leave the agreement or its effects unchanged. If parties do not agree, the court can decide. This is not easily achieved because of the requirement 'unacceptable'. Within this context it will *not* be relevant if the circumstances were foreseeable at the time the agreement was signed; it will be relevant if the parties wanted to include (expressly or implicitly) in the agreement the possibility of unforeseen circumstances. The agreements need to be reviewed in this context.

(J) Transfer of an agreement

A party to an agreement can transfer (Section 158 of Book 6 DCC) its legal relationship (or individual rights and obligations) with its counter party to a third party by private instrument (*onderhandse akte*) between the transferor and the third party and with the approval of the other party. The approval by the other party of the agreement does not have to meet any specific requirements as to form and can be given both in advance, in which case the transfer will take effect as of date of signature of the transfer agreement, and retrospectively, in which case the transfer will take effect as of the date of approval by the other party. This is relevant in case of an asset deal, for example. By law, transfer of (a part of) the share capital in the capital of a company does not affect the validity and term of the agreements entered into by the company, but parties to an agreement can stipulate otherwise ('change of control' or 'change of ownership' clause). Parties to an agreement can agree on such approval to transfer an entire agreement of individual rights

[15] HR 5 april 2013, LJN, BY8101, Lundiform / Mexx Europe.

and obligations in advance; this approval could already have been stipulated in the agreement which itself is subject to the transfer. Transfer includes all (potential and existing) claims and liabilities. The other party could be in the position (if approval had not been granted in advance) to require additional conditions precedent for its approval. Individual rights and obligations under an agreement can also be transferred, but consent of the other party is required (as well). Individual rights and obligations are also transferred, including any and all claims that could be based on these rights and obligations.

The party (transferee) to which specific agreements are transferred has to continue to perform those contracts in accordance with its terms and conditions and is liable and responsible in case of default as the transferring entity was before the transfer; an agreement can be only be assigned with all rights and obligations which are part of the agreement (no 'cherry picking').

In case of a legal split-off, agreements are transferred as part of the assets and liabilities that are split off and are acquired by universal transfer of title (*onder algemene titel*); No separate approval of the other party to the agreement is required; however, all of this is subject to the procedures to be followed as mentioned in the chapter Corporate, 'legal split-off'. Parties to an agreement can agree that a legal split-off will be a ground for termination.

(K) General terms and conditions

General terms and conditions can be made part of an agreement by reference. Parties need to agree to the applicability and a copy of the terms and conditions have to be supplied to the other party before or upon execution of the agreement. To protect consumers, in the DCC certain clauses used in general terms and conditions are determined to be void and invalid by law ('black list'), certain others are supposed to be unreasonable and are subject to annulment based on a legal claim (*vernietigbaar*) ('grey list'). Examples of 'black list' clauses are the exclusion of the right to demand performance, or clauses that exclude or limit the right to terminate for breach (*ontbinden*). Examples of 'grey list' clauses are clauses that allow the party using the general terms and conditions an unusually long period of time to perform, or that exclude or limit any legal obligation of the user of the terms and conditions to compensate damages, or that exclude the other party's right of setoff. Based on jurisprudence, these examples of void and assumed unreasonable clauses are also applied to agreements with small companies (*reflexwerking*).

3.2 Some specific agreements incorporated in the Dutch Civil Code

(A) Sale (Koop)

General principles

The rules concerning the sales contract are laid down separately in the law. Besides these specific statutory rules, customary practice and the requirements of reasonableness and fairness are an additional source of law. Many of the statutory rules are of regulatory law, particularly in B2B agreements. Below follows an explanation of several of the most important principles of B2B sales contracts under Dutch law.
"Sale is a contract whereby one person undertakes to give a thing (zaak) and the other to pay a price in money therefor." is the definition of a sales contract as laid down in Section 1 of Book 7 of the Dutch Civil Code.

The sales contract entails the transfer of ownership. Ownership is transferred through actual delivery of the item and not by signing the sales contract, unless otherwise agreed. For example, it can be agreed that the ownership, despite the actual delivery of the item of the agreement, is only transferred once the purchase price has been paid. In some cases, such as the purchase of immovable property and goods subject to registration, specific acts of transfer are required for the transmission of ownership, such as the execution of a notarial deed.

The object of a sales contract must be either an item of immovable or movable property, but can also concern property rights if the nature of those rights does not dictate otherwise. Future items may also be sold. The object of the sales contract must be sufficiently specified in the agreement.

The sales contract is effected by means of an offer and an acceptance: offer and acceptance can be given both orally and in writing. An offer can be withdrawn, provided the agreement has not been effected through acceptance or no notice of acceptance has yet been sent. However, an offer cannot be withdrawn if the offer entails an acceptance period or irrevocability ensues from the offer in any other manner. If the offer is made in writing, it is cancelled if it is not accepted within a reasonable period of time. The parties can reach alternative agreements on all of this.

The price required for the sales contract must be expressed in money and must also be realistic.

Non-conformity

The item delivered must conform to the agreement (*conformiteit*). Under the law (parties to a B2B contract may reach other agreements) non-conformity exists if the item, in view of its nature and the information the seller has provided about it, does not possess the qualities that the purchaser could have

expected under the terms of the agreement. The purchaser may furthermore expect and need not doubt that the item possesses the qualities that are required for its normal use, as well as the qualities that are necessary for a particular use that is provided for in the agreement. An item that is different from that agreed, or an item of a different type, weight, quantity or size does not conform to the agreement. In the event of non-conformity the seller has a statutory obligation to rectify the defect. The purchaser may not rely on the non-conformity if the deviation was or could have been reasonably known to him at the time of concluding the agreement. The purchaser can no longer rely on the non-conformity if he has not informed the seller of this within an appropriate period of time after he has or could have discovered this. The parties can include in their contract, for example, what an appropriate period of time would be. If a quality, which according to the seller should exist, is shown to be lacking (think, for example, of handbooks and other documentation and think of warranties), or if the deviation concerns facts which the seller knew about or should have known about but did not notify the purchaser of them in time, the notification must be made within an appropriate period of time following the discovery. Legal claims and defences in connection with the non-conformity will lapse after two years from the date when the notification was made. The parties can agree on a different limitation period. The Supreme Court (Hoge Raad 15 April 2011; Melkrobot), in proceedings about a milk robot which malfunctioned time and again, ruled that the limitation period would begin again after each (timely) complaint and that the seller would have the obligation to rectify the defect each time, quite apart from what the parties had still determined in the maintenance agreement concerning the obligation to maintain. Failure to comply with the obligation to rectify the defect leads to the right of the purchaser to terminate (*ontbinden*) the agreement.

Despite the limitation period (and here too: subject to another agreement between the parties), the purchaser retains the right to counter a demand for payment of the purchase price with his right to reduce this purchase price or claim compensation.

(B) Lease/hire (Huur)

General principles

The rules concerning the lease/hire agreement are also laid down separately in the law. The Rent Act (*Huurwet*) contains general rules that apply to all leases/hire agreements, and in addition special provisions for the letting of residential accommodation (mainly imperative provisions), furnished residential accommodation, business space (offices, factories, work shops) and retail premises. Besides these specific statutory rules, customary practice and the requirements of reasonableness and fairness are an additional source of law. A number of the statutory rules are of regulatory law, particularly in B2B agreements but to a much lesser extent than with a sales contract. Below follows an explanation of the main principles of a B2B lease/hire agreement under Dutch law.

"Lease and hire is a contract whereby one party, the lessor, undertakes to provide the other party, the lessee, with the use of a thing or a part thereof and the lessee undertakes *to perform a counter-obligation."* is the definition of a lease/hire agreement as laid down in Section 201 (1) of Book 7 of the Dutch Civil Code. The object of the lease or hire is an item (moveable or immoveable), but it can also be applicable to property rights if the nature of such rights does not dictate otherwise. The Supreme Court has not yet expressed a view as to whether the provision of software as a service ('SAAS') or application as a service ('ASP') agreement can be qualified as a hire agreement (as laid down by law). The Supreme Court in Germany (Bundesgerichtshof) did however express its views on this, and in its ruling on 15 November 2006 held that ASP can be qualified as a hire agreement (Bundesgerichtshof XII ZR 120/04, 15 November 2006).

The lease/hire agreement therefore does not entail the transfer of the ownership from one to another; its intention is to provide the use of an item to another (*huurgenot*). No special requirements are laid down for effecting the lease/hire agreement, and here too the general rules of offer and acceptance apply (see above under 'Sale'). The lessor/lender does not need to be the owner of that which is being leased or hired. The transfer of ownership of the property leased or goods hired does not terminate (*beeindigen*) the lease/hire agreement. The lessee/hirer has the right to give the use of the property or goods concerned to another party (unless otherwise agreed).

Principle obligations of lessor / lender and lessee / hirer

The lessor/lender has a number of principal obligations: to make the property or goods available, to rectify any defects to the property or goods (this may not be deviated from in the agreement to the disadvantage of the lessee/hirer) and in the case of a sale under execution of the property or goods, to take action to defend the lessee's/hirer's interests. If the use under the lease is adversely affected as a consequence of a defect, the lessee/hirer may demand a reduction in the rent / fee (here too, there must be no deviation in the agreement to the disadvantage of the lessee/hirer) in proportion to the defect. In principle the rent / fee reduction applies from the date on which the lessee/hirer has informed the lessor about the defect, until the date on which the defect has been rectified. This rent / fee reduction is without prejudice to any right to compensation for the damage that has arisen due to the defect, and here too nothing different may be agreed to the disadvantage of the lessee/hirer.

The lessee/hirer is required to pay the rent / fees, to act as a good lessee/hirer and to undo any unauthorized modifications to the property or goods concerned. The lessee/hirer is required to carry out minor repairs at its own expense (unless these have become necessary due to the failure of the lessor/lender to meet its obligation to rectify defects). The lessee/hirer is in principle assumed to have received the property or goods in an undamaged condition, and any damage to them is therefore assumed to have been caused by the lessee/hirer (except in the case of fire and, where immovable property is concerned, except the exterior of the building). The lessee/hirer is therefore

liable in principle for damage to the property leased or goods hired.

The lease/hire agreement that has been concluded for a fixed period ends by operation of law when this period of time elapses (this is not the case with tenancy agreements for residential accommodation: special termination requirements apply here). A lease/hire agreement concluded for an indefinite period ends by giving notice of termination (*opzegging*). Incidentally, it is possible to terminate both agreements by mutual consent, and as the case may arise it is possible to terminate (*ontbinden*) the agreement due to breach of contract.

(C) Professional Services (Opdracht)

General principles

The rules concerning the contract for professional services are also laid down separately in the law. Besides these specific statutory rules, customary practice and the requirements of reasonableness and fairness are an additional source of law. Most statutory rules are of regulatory law, particularly in B2B agreements. Rules are mainly imperative provisions if the contract for services is performed by a natural person acting in the conduct of his occupation or business (this includes a legal person in which the shareholder, director and employee are one and the same person). Below follows an explanation of a number of the main principles of a B2B contract for services under Dutch law.

"A contract for services is a contract whereby one party, the provider of services, binds himself towards the other, the client, to perform, otherwise than on the basis of a contract of employment, work consisting of something other than the creation of a work of a tangible nature, the deposit agreement, the publication of work, or the carriage or transportation of persons or things." (Section 400 (1) of Book 7 of the Dutch Civil Code). The exceptions referred to in the legislative text are agreements specifically provided for elsewhere in the law.

In principle the contract for professional services comprises every agreement that provides for the performance of work, with the exception of the agreements referred to in the section of the legislative text. No special rules apply for effecting a contract for services.

For a contract for services to exist, it does not matter how payment is to be made: periodically, per hour, fixed price, open budget, payment in advance or in arrears, etc. The contract for services may involve a one-off service or a periodic service and can therefore have been concluded for a fixed or indefinite period.

The agreement can be terminated (*opzeggen*) at any time (also, therefore, if the agreement has been concluded for a fixed period) by the client, unless this has been specifically excluded in the contract, which is often forgotten. The contractor cannot terminate (*opzeggen*) the agreement if it has been

concluded for a fixed period. If the agreement has been concluded for an indefinite period and is not ended through completion of the work, it can only be terminated by the contractor for compelling reasons (which will not readily be the case). This rule is of directory law. The contract for services which has been concluded with a view to a particular person performing the work will end through the death of that person. Giving notice of termination (*opzeggen*) of the agreement does not affect the termination (*ontbinding*) of the agreement due to force majeure or breach of contract, as explained above under the heading of general principles.

Obligations of contractor and client

The contractor is required to act as a good contractor. What that precisely entails will depend on the circumstances of the case and has (therefore) been developed in a series of case law. The starting point is that a contract for services is in principle a best effort obligation (*inspanningsverbintenis*). This does not affect the fact that some best efforts assume that a result will be achieved: a civil-law notary who has to execute a deed, on the grounds of which ownership is transferred, will not have fulfilled his best effort obligation if the deed is not correct and ownership is not transferred.

The contractor must follow any sound instructions given in a timely fashion by the client concerning the performance of the contract, and he must warn the client if these instructions are not sound or will not lead to the intended result. Also important is the fact that the contractor has an obligation to provide information and a duty to warn against the consequences concerning the contract: he usually has greater expertise concerning the object of the contract than the client. If the contract has been awarded specifically with a view to a person who conducts an occupation or business with the contractor or in its employment, this person is required to perform the work himself. This person is therefore also liable, besides the contractor, if the contract is not performed properly.

The obligations of the client are mainly of a financial nature: apart from payment for the work performed, also payment of expenses and damage. Payment for work performed would seem to be self-evident (after all, in a B2B payment is always agreed), but this precisely is often a point of dispute in practice; think, for example, of additional work: the contractor will want to be paid for this, while the client will take the view that there is no question of additional work, or that the contractor should have warned him that more work would need to be carried out than that specified in the agreement in order for the contract to be performed properly. The parties can make clear agreements (clearer than the law) on this.

4. Information Technology Law

4.1 ARBIT and ICT Netherlands general terms and conditions

The Dutch IT sector lacks a set of general terms and conditions that are acceptable for both the IT supplier and the IT customer. There are several sets of general terms and conditions, but none of them are perceived as balanced. The IT sector organization ICT Netherlands published their ICT~Office conditions in 2009 to replace the Fenit conditions of 2003. The ICT~Office conditions (and the Fenit conditions) are considered to be supplier-friendly. Amongst other things, the ICT~Office conditions determine that all delivery dates are indicative, transfer of intellectual property is excluded and the liability of the supplier is considerably limited. The ICT~Office conditions consist of several modules; the basic module provides general terms for providing a broad range of IT services. Suppliers that offer specific IT services such as hosting, SaaS/ASP services, software maintenance or custom-built software can add one or more additional modules to the basic module. In total there are fifteen different additional modules available. Most IT suppliers are willing to provide their services under the ICT~Office conditions but IT customers will most likely be advised to avoid these conditions.

The ARBIT are general purchase conditions of the Dutch government, which are specially designed for the procurement of IT and IT services. Government bodies and semi-government institutions mostly use the ARBIT when buying IT services. The ARBIT conditions are considered to be more balanced then their predecessor, the BIZA conditions, and the ICT~Office conditions. The ARBIT are designed to be a legal framework and require an agreement in which the contracting parties fill in the remaining details. The ARBIT is not suitable for IT services such as SaaS or ASP services; there are almost no articles applicable for SaaS or ASP in the ARBIT. Specific articles for SaaS or ASP services have to be stipulated in a separate agreement. The ARBIT is not clear about the tasks and responsibilities of the contracting parties during the implementation of software. Since the implementation of software is the source of most IT disputes, this is an aspect to take into consideration. The procedure for the acceptance of software is also pretty marginal and parties should be advised to make additional arrangements on this subject. The limitation of liability as formulated in the ARBIT is controversial. This limitation only applies to an attributable failure (*toerekenbaar tekortschieten*) in performing the tasks deriving from the agreement. Other legal grounds for liability are unlimited. Liability for personal or material damages is limited to € 1,250,000. Liability for other damages is limited to four times the agreed price for the performance of the agreement. It is unclear how this limitation is to be interpreted in case of subsequent calculation or in case of a continuing performance contract.

4.2 E-Commerce

E-commerce is a fast-growing sector in the Netherlands. According to the sector organization for Dutch web shops, Thuiswinkel.org, the total turnover of Dutch web shops amounted to almost € 10 billion euros in 2012. E-commerce is

regulated at a European level by several Directives, which have been implemented in Dutch law.

Amongst other things, a web shop is obliged to inform potential customers comprehensibly and clearly about:

i. The identity and address of the company;
ii. Contact details that ensure fast, direct and effective communication;
iii. Chamber of Commerce number of the company;
iv. VAT number of the company;
v. Key features of the product;
vi. Payment method and price including taxes;
vii. Costs and method of delivery;
viii. The annulment rights of the customer; and
ix. The applicable terms and conditions.

Once an article is delivered a customer generally has an annulment right of at least seven days. During this period a customer is entitled to return the product for a refund at no additional costs. A motion for a new European Directive on consumer rights will most likely expand the annulment period to fourteen days. Certain services and products are excluded from the annulment right. Such services and products include custom-made articles, food with a short shelf life, and services that are or are being delivered before the annulment period has expired.

The annulment period is extended to three months if obligatory information is not, or not comprehensibly, communicated to the customer by the web shop. Failure to inform a customer with regard to obligatory information constitutes an economic offence and is punishable by criminal law.

Alongside specific legislation about online commerce, regular legislation about consumer rights and (commercial) agreements also apply to the E-commerce sector.

4.3 Privay/personal data protection

On 1 September 2001 the Dutch Personal Data Protection Act (*Wet bescherming persoonsgegevens - Wbp*) entered into force in the Netherlands. This Act is the implementation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC). The object of the Dutch Personal Data Protection Act is to protect the right to privacy of individuals.

All automated processing of information concerning an identified or identifiable natural person (hereinafter: personal data) as well as manual processing by means of structured filing systems allowing easy access to personal data, is subject to the Dutch Personal Data Protection Act with the exclusion of the processing of data carried out for strictly personal or domestic purposes and the processing of personal data for national or public security matters.

The Dutch Personal Data Protection Act is applicable to the processing of personal data by any natural or legal person - regardless of the legal form - established on the territory of the Netherlands.

To process personal data in accordance with the Dutch Personal Data Protection Act, the processing has to be based upon one of eight justification defences: (a) informed and freely given unambiguous consent of the data subject; or (b) necessary for the conclusion or performance of a contract binding on the data subject; or (c) necessary as a legal requirement; or (d) necessary to safeguard a vital interest of the data subject; or (e) necessary for the performance of a task carried out in the public interest; or (f) necessary in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding.

In addition the processing must be adequate, relevant and not excessive in relation to the purposes for which the data is processed.

4.4 Cloud computing

Cloud computing is the making of on-demand use of remote resources connected to the web. Cloud computing can adopt many forms, such as Software as a Service (SaaS), Platform as a Service (PaaS) and Infrastructure as a Service (IaaS). The resources are no longer all in-house but are, so as to speak, 'in the cloud'. They can be anywhere in the world as long as there is a connection to the global world wide web. The main advantages for the user of cloud services are easy scalability and specialized services. There are different types of 'clouds', public clouds, private clouds, community clouds and hybrid clouds (hybrid clouds are a combination of one or more of the aforementioned cloud types).

One of the main risks associated with cloud computing is the (perceived) lack of control over the data (how, where and by whom the data is processed). Transparency of the chain of (sub)processors is key to the data subjects. Based on the Dutch Personal Data Protection Act a data subject should be informed about who is processing their data and for what purposes. Contractual safeguards have to be used to ensure controllers' and processor's compliance with the Dutch Personal Data Protection Act.

A precondition for entering into a contract with a cloud provider is to perform an adequate data protection risk assessment. The security measures taken by the cloud provider have to be adequate for the type of data processed. Special attention has to paid to the transfer of personal data to countries which do not offer the same level of protection as required in the European Economic Area (EEA). For transfer to such countries use can be made of standard contractual clauses adopted by the European Commission.

4.5 Cybercrime

Obtaining unlawful access to computer systems, hacking, e-fraud and online incitement of hatred are illegal in the Netherlands, but just as in the rest of the world cybercrime poses a challenge for companies, the justice department and law enforcement alike.

The Department of Justice has a specialist unit dealing with cybercrime and in January 2012 the National Cyber Security Centre was formed. The National Cyber Security Centre (NCSC) is responsible for overseeing digital security in the Netherlands. One of its main tasks is to make the Netherlands more resistant to Internet crime.

Despite good efforts, several studies show that the Dutch community believes that more should be done to combat cybercrime. These studies show that companies and the general public believe that the police and Justice Department lack the knowledge and skill to successfully combat cybercrime.

The police and Justice Department claim they lack the legislative power to successfully combat cybercrime. As a result of those claims a (controversial) bill is currently (2013) proceeding through parliament that will authorize the police and prosecutors to arrest persons suspected of selling stolen digital data, investigate or hack into suspects computers remotely, force suspects to decrypt encrypted data and to intercept data or make it inaccessible.

A critical note addressed to companies is that they often hide security breaches and data leaks from the public. In future, providers of information services will be obliged by law to report the theft, loss or abuse of (personal) data. The Personal Data Protection Act (*Wbp*) will include a duty to report data leaks. The incident must also be reported to the supervisory authority, the Data Protection Authority (*Cbp*).

4.6 Public procurement

The Dutch Public Procurement Act 2012 (*Aanbestedingswet 2012*) implements the European public procurement Directives.

The European public procurement Directives recognize different tender procedures: The open tender procedure, the restricted tender procedure, the negotiated tender procedure and the competitive dialogue tender procedure. The extent to which these procedures may be used by contracting authorities is stipulated in the Public Procurement Act. Public procurement is further regulated in the Public Procurement Decree (*Aanbestedingsbesluit*) and the Proportionality Guide (*Proportionaliteitsgids*).

Dutch public procurement law recognizes the general principles of public procurement law (non-discrimination, transparency and proportionality) and the general principles of civil law. The Public Procurement Act and the Proportionality Guide provide guidelines for applying the principle of

proportionality throughout a procurement procedure. Contracting authorities must apply the Proportionality Guide and may only deviate from the detailed provisions of proportionality if this is provided for and motivated in the tender documents.

Parties involved in a public procurement procedure are expected to adopt a proactive approach when claiming a breach of public procurement procedures. Therefore parties must use the available options to request additional clarification or notify the contracting authority of any violations of public procurement regulations and request the civil courts to take provisional measures if the contracting authority does not adequately respond.

Most tender documents contain strict limitations on the right to bring a claim for breach of public procurement regulations. In principle the courts apply these strict limitations provided they are clearly set out in the tender documents. If summary proceedings are started within twenty days of the award decision, the contracting authority is not allowed to enter into a contract until the request for provisional measures is decided on.

Most remedies for breaches of public procurement regulations are granted in summary proceedings by the civil courts. The provisional measures obtained in these proceedings are often considered the final resolution of the dispute. The remedies that can be obtained are diverse and include an order to: Retender, cease an ongoing procedure, allow a candidate to enrol in the procedure, or award the contract to a specific candidate.

5. Intellectual Property Law

5.1 Copyright

In the Netherlands copyrights are provided for in the Copyright Act (*Auteurswet*). A copyright is the exclusive right of the author of a work to publish and duplicate such work.

The definition 'work' is an open definition that includes a wide variety of materials such as books, paintings, sculptures, music, geographical maps, movies and software. The Dutch Supreme Court has ruled that a work as meant in the Copyright Act should have its own original character with the personal imprint of the author.

The right to publish a work entails the publication of such work or a part of the work and to render or lend out the work. The right to duplicate a work includes the right to reproduce the work, to translate the work and to adapt the work for screenplay or theatre. These are exclusive rights of the author.

In general the author is the person who creates the work. However, there are exceptions to this rule. In the event a work is created as a (intended) result of an employment contract, the employer of the person who created the work is generally considered the author of that work. Another exception is a work created by a person under the supervision of someone else and by design of someone else. In such an event the designer/supervisor is the author.

One more thing to consider is the commercial contract for professional services, such as a contract for the creation of a website. Unless agreed otherwise, the contractor is the author of the website created as result of providing the services. This means that the exclusive right to publish or duplicate the work remains vested in the contractor while the principal obtains a licence to use the work created by the contractor.

There are no formalities, such as registration, required for obtaining a copyright. A copyright comes into existence by the creation of the work. The duration of a copyright is seventy years after the death of the author or seventy years in the event the author is a legal entity and not a natural person.

5.2 Copyright protection software

The Dutch Copyright Act protects the expressive elements of software (object code and source code) and its preparatory design material (this includes all preparatory material that ultimately can lead to the actual computer program, for example the functional and technical design). Underlying ideas and principles are not protected, nor are those elements that are the direct result of choices made due to functionality or standards in the industry.

Software is protected if it is original in the sense that it is the author's own intellectual creation. The rightholder has the exclusive right to make or authorize a temporary or permanent reproduction of his software. This right includes the reproduction made when loading, running, displaying, transmitting or storing the software unless these actions are necessary for the normal use of the software including error correction and the making of a back-up, or are transient or occasional reproductions, forming an integral and essential part of technological process.

The copyright holder also has the exclusive right to alter the software and/or to distribute the original computer program or its reproductions for the first time, in any form, to the public. This right includes the rental of (copies of) the software. This first distribution right is exhausted after the first sale of a specific tangible copy of the software. The same applies to copies made by the lawful user of standard software by downloading a copy of the standard software with the prior permission of the rightholders, provided a one-off fee has been paid and a perpetual licence has been granted.

In addition to its right to make normal use of the program, make a back-up and correct errors, a rightful user has the right to observe the program while using the software as intended, to deduce the underlying ideas and principles and to translate the object code into source code in order to achieve interoperability, provided the information is not already (made) available to the user, the translation is restricted to the parts necessary to achieve interoperability and the information is not shared with third parties or used for other purposes than to achieve interoperability.

5.3 Database protection

The Dutch Database Act (*Databankenwet*) is the Dutch transposition of the European Database Directive (96/9/EC). The Dutch Database Act offers protection to database producers who have invested substantially in the production of a electronic or non-electronic database, against the extraction or reuse of substantial parts and/or the repeated and systematic use of insubstantial parts of their database.

For the purpose of the Dutch Database Act, database means a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. In order to gain database protection, the producer must have made a qualitatively and/or quantitatively substantial investment into the obtaining, verification and/or presentation of – already existing - database content.

Exceptions to the exclusive rights of the producer are the extraction and/or reuse of substantial parts for public security purposes or administrative or judicial procedures, the extraction or reuse of substantial parts for the purposes of illustration for teaching or scientific research to the extent justified by the non-commercial purpose, and the extraction or reuse of substantial parts of a non-electronic database for solely private purposes.

A producer being a public authority does not have the exclusive rights under the Dutch database Act if the contents of the database consists of laws, orders, resolutions, legal decisions and administrative decisions. For all other contents a public authority has to expressly reserve its right to the database in order to gain database protection.
In addition to the above, the Dutch Copyright Act offers protection to the natural or legal author of an original database structure (selection/arrangement).

5.4 Trademarks

A trademark is the exclusive right to a sign. Trademarks can be divided in several categories such as word marks, visual marks and figurative marks. A trademark can be a word, a sign or drawing, a certain colour or combination of colours, a shape of a product or packaging, or a combination of any of these features.

There are various ways to obtain trademark protection in the Netherlands. Trademarks can be registered for the Benelux region (Netherlands, Belgium and Luxembourg), for all EU member states and internationally.

The Benelux Convention on Intellectual Property (BCIP) regulates trademarks for the Benelux region. A Benelux trademark is obtained by filing an application with the Benelux Office for Intellectual Property (BOIP). The BOIP can refuse registration on absolute or relative grounds. An absolute ground for refusal is a lack of distinctive character of the sign for which registration is requested. A relative ground for refusal is another person or entity holding an identical or confusingly similar trademark for identical or similar goods or services.
Registration of a trademark takes place for certain classes of goods and services according to the Nice Classification.

Registration is valid for a period of ten years from the date the application is filed and can be indefinitely renewed for successive ten-year periods.

Community trademarks offer trademark protection in all 25 EU Member States. A trademark application has to be filed with the Office for Harmonisation in the Internal Market (OHIM), in Alicante (Spain). Just as the BOIP, the OHIM can refuse a application on absolute or relative grounds. A registered Community trademark is protected for ten years from the date the application was filed; registration can be renewed (indefinitely) for successive ten-year periods.

International registration of trademarks is regulated by the Madrid system for the international registration of marks and is administered by the International Bureau of the World Intellectual Property Organisation. International registration offers trademark owners protection in states that are signatories to the Madrid system (as designated by the applicant) by means of one trademark application procedure to be initiated with a national industrial property office. Registration of a mark is effected for ten years from the date of international registration, with the possibility of renewal for further periods of 10 years.

The holder of a registered trademark can, in principle, enforce his exclusive rights against any third party who uses the trademark (or any confusingly similar sign) in trade for distinguishing goods and/or services identical or similar to the those for which the trademark is registered.

Trademarks can be licensed and transferred. A transfer can only be effected for the whole territory for which the trademark is registered, but a licence can be granted for only part of the territory and/or for a selection of the goods and/or services for which the trademark is registered.

5.5 Trade names

A trade name is the name under which a company conducts its business. The trade name of a company is often the same as its trademark (for example the names Philips and Sony are both trade names as well as trademarks) but this is not necessary. A trade name can also be different from the legal name under which the company has been registered. The purpose of a trade name is identification of the company. A company can use multiple trade names and the right to a certain trade name derives from the use of that name. The Dutch Trade Names Act (*Handelsnaamwet*) regulates the use of trade names.

There are not many rules regarding which names can be used as a trade name and which cannot. It is not allowed to use a trade name which is misleading regarding the type of company and the legal entity of the company and it is not allowed to use a trade name which is the same or similar of that of another company if such use could lead to confusion among the general public. Use of a trade name that incorporates or consists of a trademark of someone else is prohibited if such use leads to confusion among the general public regarding the origin of the delivered services or products.

It is possible to transfer a trade name but only in combination with a transfer of the company that uses the trade name.

5.6 .nl Domain names

A .nl domain name has to be registered with SIDN. SIDN is the administrator for .nl domain names. SIDN registers .nl domain names and ensures that registered domains remain reachable.

Dutch law does not have a separate regime regarding .nl domain names. As in most of the world .nl domain names are distributed on a 'first come, first served' basis. However, it is not allowed to register a domain which incorporates someone else's personal name, trademark or trade name, if such use could lead to confusion among the general public.

Anyone who believes that the registration of a .nl domain name infringes his/her rights has the option of initiating court proceedings.

SIDN also offers a faster and more cost-efficient alternative; the dispute resolution system for .nl domain names. This system settles disputes that concern trademarks, trade names, the names of governmental and other bodies and personal names. Decisions made are published at www.wipo.int. A selection of decisions is also available from www.domjur.nl, along with court rulings handed down in domain name cases.

5.7 Trade secrets and other confidential information

Not all information pertaining to the business of a company falls within the scope of intellectual and industrial property rights, but may nevertheless contain secrets worth protecting. This can be achieved by including contractual safeguards (confidentiality and non-compete clauses) regarding such secrets – including financial information, information concerning clients, suppliers, tacit know-how, technology, prices, products, services and business strategies – in agreements with clients, partners and other contracting parties. In the event parties are still negotiating an agreement, a so-called 'non-disclosure agreement' (NDA) can be drawn up between parties in order to protect their respective confidential information in the meantime. If the other party discloses the confidential information despite its contractual obligations, this party will be in breach of contract. In order to exert additional pressure to prevent one's secrets from being exposed, one can impose a contractual financial penalty on the party who is in breach of its contractual confidentiality obligations. Under Dutch law it is not allowed to impose a contractual financial penalty *which is not subject to judicial mitigation*. Such a stipulation is void. Furthermore, a financial penalty replaces any right to damages unless the stipulation explicitly states that any damages can be claimed in addition to the financial penalty.

Disclosing business information despite a confidentiality agreement constitutes a criminal offence if the person disclosing these secrets does so in his/her capacity as a current or former employee of the company or is/has been working for the company in another capacity. The penalties for such crime may lead to imprisonment up to 6 months or a fine of up to € 19,500.

6. Litigation

Introduction

In the Netherlands the administration of justice is entrusted exclusively to judges appointed for life. The system is inquisitorial and there is no jury. The civil law system is based on Roman law and the French Civil Code - enacted in the days of Napoleon and imported in the Netherlands by his brother, Louis Napoleon. Judgments, in contrast to judgments in common law systems, are based on codified law, the main source for private law being the Dutch Civil Code. Case law also plays an important role, however, especially for the interpretation of codified law.

6.1 Dutch court system

Eleven District Courts

The Netherlands is divided into 11 districts where the administration of justice is concerned, each with its own district court.

Monetary claims up to €25,000,= and claims under employment law and tenancy law have to be submitted to the cantonal courts sections of the District Court (*kantongerechten*). Legal representation by a registered lawyer (*advocaat*) is not compulsory in cantonal cases , but in most cases is advisable.

Monetary claims above €25,000,= and for example insolvency requests have to be filed at the District Courts themselves. Legal representation by a Dutch registered lawyer (*advocaat*) is mandatory. Most cases are handled by a single judge and in more complex matters by a panel of three judges.

Four Courts of Appeal

Appeals against judgments of the district court in civil and criminal law cases can be lodged at one of the four the competent Courts of Appeal.

Supreme Court

Appeals in cassation in civil, criminal and tax law cases are lodged at the Supreme Court of the Netherlands. The European Court of Justice may overturn Dutch rulings in some cases.

6.2 Legal proceedings in general

Legal proceedings are governed by the Dutch Code of Civil Proceedings. Proceedings start after a writ of summons has been served by a bailiff (*deurwaarder*) to the defendant; a court fee is due to initiate proceedings. In the summons both the case and the evidence have to be presented by a Dutch lawyer. The defendant will have to pay a court fee, up front, as well before being allowed

to present his statement of defence. The defendant usually has about two months to submit his defence. In this initial phase, all statements are submitted in writing and no hearing take place in court.

After this first phase, the court may order the personal appearance of parties to obtain more information before giving judgment. During this hearing, usually in chambers, the judge always asks parties if they are willing to settle the case. Sometimes parties reach a settlement after having heard a provisional opinion of the court. Should parties fail to reach a settlement, the judge may appoint an expert to give his opinion on, for example, a difficult IT problem, or a failed IT project or give an interlocutory order to produce more evidence. Then parties may have the opportunity to submit further written statements, referred to as the statements of a reply (on the claimant's behalf) and rejoinder (on the defendant's behalf). Depending on the complexity of a conflict, proceedings will last four to twelve months until there is a ruling.

Excepting Intellectual Property proceedings, the lawyer's fees have to be paid by parties themselves, whether they win or lose the proceedings. In contrast to other countries, the party that is ruled against will only have to pay a fixed amount of the legal fees payable by the winning party plus the court fees payable by the winning party, which is only a small percentage of the realistic legal fees to be paid to the lawyers.

Please note that in arbitration proceedings it is often agreed that the party that is ruled against will bear all the costs incurred by the winning party, including all lawyer's fees.

6.3 Preliminary relief or summary proceedings

If a case has an urgent character, provisional relief may be requested in preliminary proceedings, also referred to as summary proceedings. The president or one of the vice presidents of the district court, in these proceedings referred to as the 'judge in preliminary relief proceedings' preside over these proceedings. A judgment in preliminary relief is only provisional in form. Proceedings on the merits of the case may follow. In practice, however, these preliminary relief proceedings are very often binding because parties do not wish to proceed any more after a judgment in preliminary relief. Preliminary relief proceedings can be completed within a month or even in a few days in very exceptional cases in case of, for example, impending strikes.

6.4 Alternative dispute resolution (ADR)

(A) Introduction

A decision in a civil court case merely provides a legal point of view on a conflict between parties and is not aimed at a solution for the problem that is or was the reason for the dispute between parties. In court cases there is little room to apply trade practices. Though a judge in a Dutch court, when giving

reasons for his decision, can use his own general knowledge of the issues that gave rise to the dispute between parties, (specific) knowledge about, for example, IT related conflicts[1] will be lacking and in such cases expert witness reports will be the basis of a court decision. Since a witness report written by an expert appointed by one of the parties is not considered independent, the court will appoint its own expert witness. This will cause court proceedings to be more costly and longer lasting. Furthermore, court proceedings are not confidential and decisions are published.

ADR in the Netherlands is a well-accepted way to deal with B2B conflicts: both the different procedures that impose a decision on the parties (arbitration and binding advice) as well as procedures aimed at conflict prevention and conflict resolution by the parties themselves assisted by an independent third party (mediation, non-binding advice, conflict prevention). Other than court proceedings, ADR is always based on an agreement, which could either be drawn up in advance when there is not yet a dispute or when a conflict has arisen. Hereinafter we will describe the ADR procedures available and applied in the Netherlands and their legal basis (if any). Several institutions provide B2B ADR services in the Netherlands. Since 1989 the Foundation for IT Dispute Resolution (*de Stichting Geschillenoplossing Automatisering*), abbreviated to 'SGOA' (www.sgoa.org), has been the institution that deals with the most IT cases. The SGOA provides arbitration, mediation, expert witness advice, expert witness reports, binding and non-binding advice and conflict management procedures with independent experts that are associated with the SGOA.

(B) Arbitration and arbitrational short proceedings

Arbitration is regulated in the Dutch Code of Civil Procedure (*wetboek van rechtsvordering*). Arbitration institutions have established their own regulations in accordance with and in addition to or deviation from the law (to the extent allowed). Apart from matters of public order (such as tax and family matters, but there is no specification or exhaustive listing in the law of such matters), parties can agree on arbitration for any and all conflicts related to or based on their commercial contract. Parties can agree upfront (before they have a dispute) or ad-hoc once they have a dispute. An agreement in writing is a prerequisite, however this can include an arbitrational clause in general terms and conditions that are made part of a written agreement by reference. The arbitrational decision has to be based on the rules of law unless parties have arbitrators will judge ex aequo et bono (*als goede mannen naar billijkheid*). In any case the arbitrators will apply and take into account trade practices. By law, the number of arbitrators who deal with a case has to be unequal. The law does not require the arbitrators to have any specific skills or expertise but institutes like the SGOA will make sure their arbitrators have the relevant skills and experience. When arbitration is rightfully agreed upon, the court will have no competence. The arbitrational hearing and the decision are confidential; the parties may however agree otherwise. Confidentiality of the whole procedure is accepted in several decisions of courts of appeal and the Supreme Court (*Hoge Raad*). In an arbitrational procedure, representation by an attorney-at-law is not required, but will be advisable in all except very

straightforward cases. Parties themselves can decide upon the arbitrational procedure, but if arbitration at an institution is agreed upon, the regulations of the institution will be applied. In any case the parties and arbitrators are bound by the limits and principles set by the law, such as the right to hear and be heard. The evidence, the dividing of the burden of proof, the weighing of the evidence and the appraisal of the evidence presented is for the arbitrators to define and decide upon. The arbitration will end in a written decision. Arbitrational appeal is possible but only when parties have agreed to it. Once deposited at the court chancery and granted an executorial title, the decision can be executed and performance can be enforced. The Netherlands (together with some 150 other countries) is party to the Treaty of New York[2]; the treaty provides for a relatively easy procedure to execute arbitrational decisions in other member states compared to court decisions. For many parties this is a reason to agree upon arbitration in international commercial contracts. Annulment of an arbitrational decision by the competent court of jurisdiction is possible on limited grounds, of which the most relevant are: violation of the principle to hear and be heard, absence of a valid arbitration agreement, violation of the agreed arbitrational rules, decision is not signed, the decision is incompatible with public order, the decision lacks any reasoning (poor reasoning is not a ground for annulment). An annulment procedure will of course bring the arbitrational decision in the public domain.

A completely new arbitration law is in preparation. With this new law, the Dutch government aims to improve the Netherlands' international competitive position. Some of the new features and relevant modifications include: validity under Dutch law of an arbitrational agreement under foreign law, introduction of a quality standard for the arbitrators and clerks, appointment by the arbitrators of experts to provide advice, preliminary measures during arbitration on the merits of the case (in the same proceedings), the possibility to agree that no reasons at all are required, legal basis for the confidentiality, e-arbitration.

(C) Binding and non - binding advice

Other than arbitration, binding and non-binding advice is not incorporated in the law as such; binding and non-binding advice is in fact a professional services agreement (*overeenkomst van opdracht*) between the parties having a conflict and the expert providing the advice. The professional services agreement is regulated in the Dutch Civil Code. Nearly all of the sections are regulatory law in a business-to-business relationship. The legal obligations of the expert providing the advice are on a best-effort basis (unless otherwise agreed). An expert witness, for example, can be requested to provide an expert witness report on a specific technical issue. Parties need to agree on the research question for the expert from whom they seek advice. In case of a binding advice, the parties appoint an expert and agree to conform to the advice provided by the expert. Non-fulfillment of this obligation will cause a breach (*toerekenbare tekortkoming*) by the defaulting party and would make this party liable for the damages (*schade*) suffered by the other party in accordance with the general legal principles of breach, default notices and

default as incorporated in the Dutch Civil Code (unless otherwise agreed). Parties can also agree to qualify the binding advice by the expert as a settlement agreement (*vaststellingsovereenkomst*). The settlement agreement too is regulated in the Dutch Civil Code (the sections are mainly of regulatory law in a business-to-business relationship). A settlement agreement (subject to some exceptions) can include obligations that would otherwise be forbidden or void under Dutch law. When the settlement agreement is incorporated in a notarial deed, it can be enforced (*executoriale titel*).

(D) Mediation

For many years in the Netherlands, mediation has been considered a conflict management tool for C2C or B2C conflicts and associated with the 'woolly sock' brigade and softies. This is changing: companies (and their boards and management) are discovering mediation as a highly efficient tool to resolve conflicts, both in 'exit scenario's' and in situations in which parties the wish or need to continue their relationship. EC Directive 2008/52/ EC acknowledges mediation as a relevant tool to facilitate ADR and make it easier in civil and business disputes to settle and then execute the settlement amicably. Implementation of this directive in Dutch legislation was due for May 2011, but only finally made it in November 2012 into a very simple law that is basically meant to comply quickly with the EC Directive on a minimal basis, since the deadline for implementation of the Directive had already lapsed. The biggest issues that had not been resolved in time relate to a mediator's right of refusal to testify (*verschoningsrecht*), which right is specified in the Directive and to the quality standards a mediator should meet and permanently fulfil (which is left to the individual countries to regulate). The present Mediation law provides for a right of refusal to testify but only applies to international conflicts (at least one of the parties is based in another EC country, with the exclusion of Denmark). In May 2013 one of the members of the Dutch parliament introduced draft legislation for a new Mediation law[3]. In this draft law the quality standards (such as with regard to knowledge and skills, experience and permanent education) of the mediator are secured and a system of registration, oaths and disciplinary law is introduced. Mediators have heavily protested against this law; it is not clear if and when there will be a revised Mediation law. For some time there will a different legal system for national and international mediations.

There are several professional institutions – such as the foundation for the settlement of IT disputes (SGOA, www.sgoa.org) that provide mediation procedures for parties; such institutions have implemented their own regulations, such as with regard to procedures and confidentiality. For national mediation proceedings and more specifically with regard to confidentiality and a mediator's right of refusal to testify, Dutch jurisprudence and jurisprudence of the European Court is still relevant. The Dutch Supreme Court has ruled that mediation is always on a voluntary basis and that the mediator has no right to refuse to testify.[4]

However with regard to B2B mediations some local courts have expounded the principle of voluntariness to the extent that parties can be obliged to participate. This is similar to the decision of the European Court of Justice in the Alassini / Telecom Italia case: voluntariness in the outcome, not in the participation.[5]

Schedule 1

	N.V.	B.V.	Foundation	Cooperatives	Associations
Purpose and nature of the activities	Commercial purpose	Commercial purpose	Not for profit purpose	Commercial purpose	Not for profit purpose
Type of control and governance	Management board that is appointed, suspended and dismissed by the general meeting of shareholders Optional supervisory board unless large companies regime applies in which event a supervisory board is mandatory	Management board that is appointed, suspended and dismissed by the general meeting of shareholders Optional supervisory board unless large companies regime applies in which event a supervisory board is mandatory	Management board that appoints, suspends and dismisses its own members, unless a supervisory council exists which is authorized to appoint, suspend and dismiss the members of the management board Optional supervisory council	Management board that is appointed, suspended and dismissed by the general meeting of the members Optional supervisory board unless large companies regime applies in which event a supervisory board is mandatory	Management board that is appointed, suspended and dismissed by the general meeting of the members Optional supervisory board
Transferability interests	Yes	Yes	No	No	No
Possibility to distribute profits	Yes	Yes	No	Yes	No

Schedule 2

Exceptions to the required work permit

No work permit is required for employees from outside the European Economic Area (EEA) and from Bulgaria, Romania and Croatia, if:

1. A company from the Netherlands delivers goods to a foreign customer and it is necessary for employees of that foreign customer to come to the Dutch company in order to:
   - check, certify and inspect the goods in question or examine them in another way;
   - become familiar and gain experience with the goods to be able to work with them after delivery.
     This is a pilot. Companies that want to make use of it must apply to the Employee Insurance Agency (UWV).

2. The employer hires staff via a company or a temporary employment agency;
   In this case the company or temporary employment agency must apply for the permit.

3. The employee has a residence permit with the endorsement 'work is allowed without restrictions, work permit not required'.

4. The employee has a sticker in his or her passport with the endorsement 'work is allowed without restrictions'.
   This sticker is valid for a limited period of time. The term of validity is indicated on the sticker itself.

5. The alien has a residence permit for 'work on a self-employed basis', as long as the activities are part of the work for which the residence permit was issued.

6. The employee has his or her main residence outside the Netherlands and performs work for which he or she occasionally works for a short time in the Netherlands.
   This applies, for example, to musicians, guest lecturers and journalists.

7. The employee is a knowledge worker (also sometimes called a knowledge migrant). A knowledge worker may work in the Netherlands only with a valid residence permit.

   Knowledge workers are:
   - Employees who will be earning a gross salary of at least EUR 52,010 per annum, or a gross salary of EUR 38,141 if he or she is under the age of 30 years;
   - A foreign student who graduated in the Netherlands with a starting salary from EUR 27,336.
   - The amount of the salary of the following group of employees is disregarded:
   - Doctoral candidates (irrespective of their age);
   - Postdoctoral and academic lecturers under the age of 30 years.

8. The employee works at an organization with which the Dutch government has concluded an international agreement that no work permit may be required.

9. A service provider established in a different EU Member State, the EEA or Switzerland has an employee perform work temporarily in the Netherlands in the context of cross-

border services and reports this work to the Employee Insurance Agency. If the service provider does not report the performer of the service, it will be fined by the Social Affairs and Employment Inspectorate (*SZW*). The obligation to report applies to employees from a country to which no free movement of employees applies.

The report must be made in writing at least 2 working days before the start of the work. If the service consists of making workers available, for example via temporary employment agency, secondment agency or subcontractor, a report will not suffice. In that case a work permit is required.

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1. Business taxation

1.1 Corporate income tax, general

Business taxation comes in a variety of forms, from corporate income tax to property tax and environmental taxes. The amount of tax to be paid depends on a number of factors. Generally, though, the Netherlands is considered an attractive location for international companies. Below is an outline of how corporate income tax is regulated in the Netherlands.

(A) Which companies pay corporate income tax?

Corporate income tax is governed by the Corporate Income Tax Act (*Wet op de vennootschapsbelasting 1969*). The act refers mainly to the public limited company (N.V.) and the private limited company (B.V.), but virtually all corporate entities are subject to Dutch corporate income tax.

Companies established in the Netherlands are resident taxpayers. These companies are liable to tax on their worldwide income. Companies not established in the Netherlands but earning income in the Netherlands are non-resident taxpayers. These companies pay tax on some of their Dutch-derived income.

Whether a company is deemed resident or non-resident for tax purposes depends on factors such as the place of actual management, the head office location, and the place where the general meeting of shareholders is held. According to the Corporate Income Tax Act, all companies incorporated under Dutch law are deemed resident.

(B) How much corporate income tax does a company pay?

The amount of corporate income tax paid depends on the income and capital gains the company generates (less deductibles) in a given year. Below are the corporate income tax rates and the key influences on calculating profit for tax purposes.

(C) Tax rates

The first EUR 200,000 of taxable profits is taxed at 20%. Anything above that is taxed at 25%. There is also a special tax regime, known as the Innovation Box, for income relating to self-developed patented intangible assets or qualifying R&D activities. If qualified, these profits are taxed at 5%.

1.2 Research and development tax incentives

The Dutch tax systems includes various incentives regarding research and development activities. These incentives have various effects:

- Profits that can be attributed to the so-called Innovation Box are taxable at a rate of only 5%.
- The Research and Development Facility on labour costs provides with an actual reduction of the wage tax due.

- The Additional Research and Development deduction leads to an additional deduction of expenditures for corporate income tax purposes, thus lowering the taxable profit.

Below we go into more detail on these incentives.

(A) Innovation box

If the company has opted for the innovation box, an effective 5% corporate income tax (CIT) rate will apply to a portion of income, which may be from case to case, the earnings before interest and taxes (EBIT) which is derived directly from qualifying intellectual property ("IP"). The innovation box is not limited to income from patents, as income from "qualifying R&D-activities" may also be included in the innovation box (see below). R&D expenses are immediately deductible, i.e. in the year in which they are incurred. The innovation box does not apply to losses from the innovative activity, which means that these are deductible at the regular tax rate of 25%. But the 5% rate will only apply to the proceeds from patents and qualifying R&D-activities after recovery of those losses and expenses at the regular tax rate.

(B) Research and Development Facility - Labour costs

The Research and Development Facility (RDF) is a reduction for wage tax liability and social security contributions. In effect, it subsidizes R&D labour. In 2014, the deduction is 35% of the first € 250,000 in R&D wage costs, and 14% of the R&D wage costs in excess of €250,000. The R&D wage costs are calculated using a fixed average hourly wage, which applies to all R&D employees. Proceeds from intangible property, for which the RDF was granted in the development stage, may be included in the innovation box (see above).

(C) Additional Research and Development deduction

The Research and Development Deduction (ARDD) is a deemed tax deduction for R&D related expenses, effective as of 1 January 2012. The ARDD comes on top of the deduction of actual R&D expenses, and in addition to the Dutch Innovation Box. In 2014, the ARDD amounts to 60% of the annual R&D costs (R&D labour costs excluded, but see above.) The ARDD for expenditures of € 1 million or more will be taken into account during a period of five years.

Taxpayers who spend not more than 150 hours per month on qualified R&D Aactivities are entitled to a deemed deduction of € 15 per hour. Small enterprises spending more than €50,000 annually are entitled to the 60% ARDD.

Since 2012 entrepreneurs can claim a fixed amount for RDD in their personal income tax return. The amount for 2013 and 2014 is fixed on € 12,310. Starters can claim an additional fixed amount of € 6,157.

1.3 Applying the principles of sound business practice and consistency

Profits must be determined on the principle of sound business practice and in a consistent manner. Sound business practice means, for example, recognising

unrealised losses and disregarding unrealised profits. Consistency means employing a certain degree of continuity in the method used to calculate profits. The method may only be changed if it is in line with sound business practice.

(A) Depreciating fixed assets

Fixed assets used for running a company are depreciated on an annual basis. Taxpayers are free to choose any depreciation method, but the method chosen must be in accordance with sound business practice. The straight-line method is often used, charging a fixed annual rate of depreciation over the useful life of the asset. Companies may write off only up to 50% of the value of their business premises. This value is determined annually by the municipal tax authority (WOZ value). Goodwill depreciation is limited to 10% of the purchase price on an annual basis. Other operating assets are limited to 20% a year.

(B) Valuing stock

The way in which stock is valued has a direct impact on profits, so only the following three stock valuation methods are permitted:

i. Valuation based on cost
ii. Valuation based on cost or lower market value
iii. The base stock method.

Valuation at cost price complies with the principle of sound business practice, unless the market value is significantly lower than the cost price. In that case, the lower value should be entered. This ignores unrealised profit, but takes into account unrealised losses immediately. Stock can be valued using either the ‘first in, first out’ (fifo) or ‘last in, first out’ (lifo) method. Occasionally, and under certain conditions, the base stock method is permitted. The base stock is the stock a company needs to continue its production and sales processes.

(C) Valuing work in progress and orders in progress

When it comes to long-term projects, such as construction work, profit must be calculated and booked on an on-going basis. In other words, it may not be postponed until the entire project is completed. The same applies to orders in progress.

(D) Deducting costs

In principle, all business expenses are deductible. However, there are restrictions. Certain expenses, such as fines and some entertainment costs, cannot be deducted. Further, not all interest costs can be taken into account as a deduction.

(E) Deduction of interest

Generally spoken, interest paid can be deducted as costs. Certain exceptions however apply.

I. Circular transactions or group transactions

Interest paid on loans related to repayment of equity, payment of dividends or contribution of capital, are in principle not deductible. An exception is possible in case the company paying the interest provides evidence that both the transaction as such and the loan are based mainly on sound business reasons, or that the interest received is subject to at least 10% taxation.

II. Long term loans with non-businesslike interest rates

There is a disallowance of interest deduction on loans obtained from a related party that have no fixed maturity or a maturity of more than ten years that bears no interest or an interest rate which is substantially lower than that which would have been agreed between unrelated parties.

III. Disallowed interest deduction of acquisition debt.

The thin capitalization rule is abolished on 1 January 2013. However, new rules on excessively debt-financed participations have been enacted as of January 1st, 2013. Based on the new rule, a taxpayer may not deduct excessive participation interest expenses relating to loans taken out. The deduction may apply irrespective of whether the Dutch taxpayer uses the loan to finance either a Dutch or a foreign participation. Insofar as the average acquisition price of a (qualifying) participation exceeds the average fiscal equity of the Dutch company, the participation is deemed to be excessively leveraged. Interest expenses and related costs incurred on this excess financing are in principle not deductible. An exception is made for companies who are expanding their business activities. Generally the interest expenses relating to such an expansion remains deductible. The threshold for interest expenses and related costs incurred on excess financing amounts to € 750,000 per year.

IV. Hybrid debts

Debt with certain equity features is considered to function as equity for tax purposes. The remuneration of and changes in the value, including write-offs, of these loans are not deductible.

V. Non-businesslike loans

In a case where a credit risk on loans with a certain non-businesslike feature has been accepted by a creditor in his capacity as shareholder and not as a creditor, write-offs of such loans are not tax-deductible. A non-deductible write-off loss can, however, result in a deductible loss upon liquidation of the participation that is the debtor of a non-businesslike loan.

VI. Guarantee from related parties

The aforementioned disallowances of interest deduction mainly apply to loans from related parties. However, also third party loans may be subject to a disallowance of interest deduction. A guarantee from a related party may taint a third party debt, unless the sole purpose of the guarantee was to obtain a lower interest rate. Accordingly, the guaranteed debt may fall within the scope of rules that limit deductibility of interest expense. Where the guarantee is given to enhance the company's capacity to obtain third party finance, that portion of the debt that could not be borrowed without the guarantee will be tainted.

(F) Creating reserves

A company may build up certain reserves (thus lowering its profits) by making a deduction from its profits. Examples of permitted reserves are the cost equalisation reserve and the reinvestment reserve. The cost equalisation reserve enables recurring costs to be spread evenly over a certain period by charging costs to years in which they are not incurred. Examples include large-scale maintenance or environmental damage.

A reinvestment reserve may be created if fixed assets have been lost, damaged or sold to the extent that the payment received exceeds the book value of the assets. The amount received is not considered profit as long as the company intends to re-invest it. As a rule, the reserve must be terminated in the third year following the year in which it was formed.

1.4 Setting off losses

A company may set off its losses retroactively against its taxable profits in the preceding year (carry back) and against its taxable profits for the next nine years (carry forward). Losses incurred by an investment institution or a company ceasing operations entirely may be set off only against future profits if at least 70% of the shares continue to be held by the same individuals, to prohibit trade in losses.

Losses of a so-called holding company or group financing company may be set off only against later profits of years in which the company activities still consist of at least 90% group financing or of holding participations and certain anti-abusive requirements are complied with..

1.5 CFC legislation

In principle, no CFC legislation applies in the Netherlands. Only if a tax payer participates in a company:

1. the assets of which consist for 90% or more of free portfolio investments;
2. and its profits are not taxed at an effective tax rate of 10%;

then such participation must be valued at the fair market value in the books of the tax payer provided that he (or together with a related entity) has an equity stake of at least 25% in such company.

1.6 Corporate income tax exemptions

There are various corporate income exemptions available, either permanent or temporary in nature. Permanent exemptions include dividends received from and capital gains realised on the shares in qualifying Dutch or foreign subsidiaries (the Dutch participation exemption) and certain categories of foreign source income covered by tax treaties. Temporary exemptions include the profits and capital gains from qualifying mergers, de-mergers and spin-offs and the replacement of certain business assets, including real property (reinvestment reserve). Below we look at one of the main pillars of the Dutch corporate income tax, the Dutch participation exemption.

1.7 Dutch participation exemption

The Dutch participation exemption scheme applies to both domestic and foreign interests of a Dutch company. The aim of this exemption is to avoid double taxation when the profits of a subsidiary are distributed to its parent company, but it undoubtedly enhances the Netherlands' attractiveness as a holding company location.

Main features of the participation exemption

Dividends (including 'hidden' profit distributions) and capital gains from the sale of shares in a subsidiary are tax-exempt. However, losses from the sale of shares are not deductible. If the value of a shareholding decreases as a result of losses suffered, its write-down by the parent company is usually not deductible either. Costs associated with owning a shareholding are deductible (except interest related to excessively debt financed participations as mentioned earlier); however, costs related to buying or selling the shareholding are not deductible. Losses arising from liquidating a shareholding may be set off under certain conditions.

(A) Generally, the Dutch participation exemption is applicable to shareholdings of at least 5% in the paid up share capital of a company. Holdings of less than five percent will generally not qualify as a participation for the participation exemption, unless a group company already has a qualifying participation. Further, the participation exemption will not be applicable to investments in "low taxed portfolio participations".

In order to benefit from the participation exemption one of three tests should be passed; the motive test, the tax burden test or the asset test.

The motive test should be passed if the participation is not merely held with the purpose of generating a return that can be expected from normal asset management and the participation is not considered to be a low taxed portfolio participation. A low taxed portfolio participation is a subsidiary which (a) holds more than 50% "free investments" (asset test) *and* (b) is taxed at an effective rate of less than 10% of its profits calculated in accordance with Netherlands tax standards (tax burden test). Hereinafter, we will elaborate on these two test.

Ad (a) Asset Test

The following remarks can be made in respect of the asset test.

i. If more than 50% of the assets of the subsidiary are free investments, the asset test is not cleared; Assets are free investments if they are not required within the enterprise of their owner. Mortgage-backed loans held by a bank and office properties held by an ordinary business enterprise will not qualify as a free investment for the application of the participation exemption;
ii. In principle, assets which are used for passive financing activities (loans to affiliated companies) will be deemed as free investments for the asset test;
iii. Holdings of the subsidiary in other entities of less than 5% are generally deemed to be a free investment;
iv. All directly and indirectly held assets must be aggregated; and

v. The asset test is a continuous test.

Ad (b) Tax Burden Test

Regarding the tax burden test the following remarks may be made.

vi. The tax burden test is applied at the level of the subsidiary;
vii. An effective rate of at least 10% on the profits of the subsidiary is required to clear this test;
viii. The profit determined should be in accordance with Netherlands standards, i.e. the nominal tax rate is not sufficient to determine the tax burden at the level of the subsidiary; and
ix. If the subsidiary is subject to a (nominal) tax rate that differs significantly from the Netherlands tax rate or if the rules of profit calculation differ from Netherlands rules, a yearly examination should be made whether this test is cleared.

If both the above mentioned tests can not be cleared, the participation is re-qualified as a "low taxed portfolio participation" as a result of which the participation exemption will not be applicable on the profits distributed by this participation or the profits derived from the sale of the participation. If one of the tests can be cleared, the participation exemption is applicable.

Real Estate Subsidiaries

However, despite of being a low taxed portfolio participation, the participation exemption will be applicable if a subsidiary is regarded as a real estate subsidiary. A subsidiary will generally be treated as a real estate participation if more than 90% of its assets, on a consolidated basis, consists of real estate which is not held by a mutual investment fund. Even if the subsidiary is low taxed and holds more than 50% free investments (and therefore in principle will qualify as a low taxed portfolio participation), the participation exemption will be applicable on profits derived from real estate subsidiaries..

1.8 **Can a group be taxed as one fiscal entity?**

A parent company and one or more of its subsidiaries may be taxed as a group (a fiscal unity) under conditions stipulated by the Corporate Income Tax Act. It may thus file a consolidated tax return. For corporate income tax purposes, this means the parent company absorbs all assets, liabilities, the profit and losses of the subsidiaries. The main advantages of fiscal unity are:

(A) the losses of one company can be set off against the profits of another group company; and
(B) fixed assets may be transferred tax-free from one company to another.

Group taxation is only allowed if all the companies involved are based in the Netherlands for tax purposes and the parent company holds at least 95% of the shares representing at least 95% of the profit and the equity of the subsidiary and at least 95% of the voting rights) in the subsidiary. In addition, all group companies must have the same financial year subject to the same tax regulations.

A request for group taxation is submitted to the Tax Inspector, which will check that all conditions are met, including the technical aspects involving consolidated

accounts. Group taxation may be terminated on request or automatically if any of the conditions are no longer met.

1.9 Are mergers exempt from corporate income tax?

There are three types of merger: the stock merger, the legal merger and the enterprise merger.

In a stock merger, corporate shareholders exchange their shares for shares in another company. Generally, no corporate income tax is due since it is subject to the participation exemption. Also in case the participation exemption does not apply, taxes on any capital gain can be avoided by using the stock merger relief. When this relief is applied:

(A) The target company's shareholders are exempt from corporate income tax on the transfer, and
(B) the existing tax basis in the target shares rolls over to the shares received in consideration. This defers any gain made by the shareholder in the target company, so tax on capital gains does not arise.

In a legal merger, the assets and liabilities of one or more companies are transferred to an acquiring company. The acquired companies cease to exist. The following relief applies to a legal merger:

(A) The original company pays no tax on the disposal of its assets, and
(B) The merged company obtains the original company's existing tax basis in the transferred assets, liabilities and fiscal reserves, which effectively defers any gain.

In an enterprise merger, one company takes over the assets and liabilities of another (or an independent part thereof). The transfer takes place in exchange for shares issued by the other company, a small amount of non-share consideration is permitted. A relief applies, meaning:

(A) The original company pays no corporate income tax on the transfer,
(B) The original company's assets transfer on their existing tax basis, so that any gain is deferred until the acquiring company sells them.

1.10 When is the corporate income tax return filed?

Irrespective whether activities are performed through a legal entity (public limited company (N.V.) /private limited company (B.V.)) or a branch, an annual corporate income tax return must be filed with the Tax Administration within five months of the end of its financial year. This can only be done electronically. The return includes all the information needed to establish the company’s taxable profits, including the balance sheet, profit and loss account and any other (prelisted) information requested by the Inspector.

If a tax return is not filed, the Inspector may issue an estimated (ex-officio) assessment. The final assessment must be issued no later than three years after the end of the relevant tax year. If an extension is granted for filing the return, the period is extended by the period of the extension. The accounting records must be retained for at least seven years.

1.11 **Extending the deadline for filing a Dutch corporate income tax return**

Usually extension for filing of a corporate income tax return can be requested for with a maximum of eleven months. Since the usual due date for filing the return is June 1st of the second year, extension is granted till 1 May of the third year (e.g. 1 May 2015 for the 2013 corporate income tax return).

1.12 **Penalties**

If a corporate income tax return is not filed within the aforementioned terms, penalties can be imposed up to € 4,920. Non compliance (not filing at all) can lead to more severe penalties, imprisonment and personal liability of the directors for tax debts.

1.13 **Tax return and assessment**

After filing the return, an assessment will be imposed by the tax inspector. The taxes due must be paid within six weeks after the date of the assessment. At year start a preliminary assessment can be issued based on the average profit of the last two years the tax authorities avail of. Tax payers can also request the tax inspector for a preliminary assessment or an adjustment thereof. These assessments are set off against the final assessment.

1.14 **Interest**

Effective 1 January 2014, the tax interest for corporate income tax will be linked to the statutory interest rate for commercial transactions, subject to a minimum of 8%. The tax interest for other forms of tax and interest on overdue/overpaid tax will be linked to the statutory interest rate for non-commercial transactions, subject to a minimum of 4%. Based on the transitional regime, the new interest rates will only apply from 1 April 2014 forward.

1.15 **Transfer pricing requirements**

Companies engaged in inter-company transactions with related (foreign and/or domestic) parties are required to prepare transfer pricing documentation irrespective whether these activities are performed through a legal entity or a branch.

1.16 **Deadline documentation**

Transfer pricing documentation must be prepared contemporaneously. In case of a tax audit, the documentation must be submitted within 3 weeks - 3 months, depending the amounts involved and the complexity of the transactions. However, it is advisable to be able to provide this information immediately upon request. This documentation should prove that business-like prices and conditions were applied in transactions between related parties.

1.17 **Penalties for non-compliance**

Having no or not-sufficient documentation available to substantiate the pricing of intra group transactions, can lead to various adverse consequences. These consequences can include:

(A) Liability for the management for filing an incorrect corporate income tax return;
(B) reversal of the burden of proof from the tax authorities to the tax payer;
(C) adjustments, including interest and penalties up to 100% of the extra taxes due;
(D) double taxation.

Adjustments can be made for a period of five years.

2. Individual taxation

Individuals are liable to income tax. This is the equivalent to businesses paying corporate income tax. There are three categories of income, each with their own tax rates. These categories are referred to as 'boxes':

Box 1: income from wages, benefits, pensions and dwellings
Box 2: income from substantial shareholdings (5% minimum interest)
Box 3: income from savings and investments

The Netherlands applies a progressive tax system (i.e. the more you earn, the higher the applicable tax rates) in box 1.

2.1 Income tax

(A) Which individuals pay income tax?

All individuals earnings are of the above categories of income and subject to income tax. That includes individuals living in the Netherlands (resident taxpayers) and individuals living abroad but who receive income from the Netherlands (non-resident taxpayers). Residents are taxed on their entire worldwide income, regardless of where that income originates. Non-residents are taxed only on income directly connected with the Netherlands, although non-residents can apply to be treated as a resident taxpayer if they wish.

Income tax is levied on an individual basis. However, fiscal partners are permitted to combine some elements of their income for tax purposes. Fiscal partners are spouses and registered partners. In addition, unmarried couples living together meeting certain conditions are considered as partners for tax purposes. Joint elements of income are taxable income from an owner-occupied dwelling, taxable income from substantial interest and personal tax deductions.

(B) How much tax do individuals pay?

The Netherlands is a socially-conscious country, so employees have to pay a hefty tax bill compared to those in many other countries. Having said that, their personal situation, type of work, residency status and other earnings and expenses can affect their tax position considerably. In addition, rebates are available to contribute towards an equitable distribution of the tax burden, assisting those at the lower end of the income scale.

Tax rates in 2014

Box 1 rates (income from work and dwellings) for people not entitled to the AOW pension scheme:

i. Bracket 1: 36.25% on the first EUR 19,645*
ii. Bracket 2: 42% on the next EUR 13,718**
iii. Bracket 3: 42% tax on the next EUR 23,168
iv. Bracket 4: 52% tax on the excess.

*comprises 5.10% in tax and 31.15% in social security contributions.

**comprises 10.85% in tax and 31.15% in social security contributions.

Note that income can be reduced by, for example, mortgage interest, childcare expenses and charitable donations. All are subject to conditions, which are revised every year. People entitled to the AOW pension scheme have different rates.

Box 2 generally applies if a substantial interest (5% or more) of shares in a company is held by an individual (alone or with his fiscal partner) and this interest is not attributable to an enterprise. The Box 2 rate (income from a substantial shareholding) is 25% for income exceeding €250,000, income up to € 250,000 is taxed at a rate of 22%. This reduced rate applies in 2014 only.

The Box 3 rate (taxable income from savings and investments) is a flat rate of 30%. To calculate the taxable income, the total amount of savings and investments, less the tax-free capital threshold and eliminating the first EUR 2,900 of any liabilities, is multiplied by 4%. The result is subject to the 30% flat rate

(C) Reducing the individual's tax bill with rebates

All individuals are entitled to some form of tax rebate, which reduces the amount of tax they have to pay:

i. Personal tax deductions relate to costs that affect the taxpayer's financial position and ability to pay tax. For example, the cost of child maintenance or alimony, study expenses and exceptional expenses (e.g. on account of illness). Such costs are deducted from taxable income derived from work and dwellings (Box 1). If this is insufficient, deductions from taxable income from savings and investments (Box 3) follow, followed by deductions on taxable income from substantial interest (Box 2). Any remaining deductions are carried forward to subsequent years.

ii. A general tax credit (max. EUR 2,103 in 2014) applies to all resident taxpayers. The general rebate comprises a tax element and a social security contribution element. Entitlement to the contribution element applies if the employee has compulsory Dutch social security coverage.

iii. Supplementary tax credits take account of the level of income and the taxpayer's personal circumstances, for example parents with children, single parents and elderly people with a small income.

iv. Employed person's tax credit applies to all those in employed work (EUR 2.097 max. in 2014).

(D) How do individuals pay their income tax?

The calculation and payment of income tax is regulated by the Income Tax Act 2001 (Wet inkomstenbelasting 2001). All individuals must electronically file a tax return within three months of the end of the fiscal year.

Extension for filing the return can be obtained for a period of 13 months.

The fiscal year is the same as the calendar year. After filing the return, an assessment will be imposed by the tax inspector. The taxes due must be paid within six weeks after the date of the assessment.
Self-employed people can pay monthly instalments in advance, by estimating their annual income. Again, they calculate their final tax bill when completing their tax return.

(E) Taxable income from work and dwellings: Box 1

Income from profits, employment and home ownership is categorised as Box 1 income (Box 1 refers to the first section of the personal income tax return). Different tax rates apply; the top rate is 52 %.

The taxable elements of the following are aggregated and entered into Box 1:

i. Employment income
ii. Profits from business activities
iii. Income from other activities (e.g. freelance income, commercial rent)
iv. Periodical payments and grants (e.g. scholarships, government subsidies)
v. Income from an owner-occupied dwelling

This income may be reduced by certain expenditure (e.g. premium for retirement annuities, mortgage interest) and personal allowance (this deduction may partly run over into Box 3 and after that possibly into Box 2).

Legislation with respect to (negative income of) an owner-occupied dwelling is constantly changing. As of 2014, (negative) income from a owner - occupied dwelling cannot be deducted at the highest tax rate. In case (part of) the income is taxable at a rate of 52%, the deduction is calculated at the applicable tax rate; for the amount of negative income that is taken into account at the 52% rate, an adjustment is made of tax due of 0.5% of this amount. As a balance, the negative income is deducted at an actual maximum rate of 51.5%. Aforementioned adjustment will annually be increased with 0.5%.

Note that tax on employment income is paid over to the Tax Administration by the employer as wage tax or PAYE (pay as you earn) tax. All other tax is paid directly by the individual.

(F) What is considered employment income?

The principal way of paying an employee's remuneration package is 'wages in cash'. This is the basic salary, holiday allowance, overtime payment, commissions, annual bonus and any other monetary payment for work. The term 'wages in cash' is something of a misnomer. The majority of employees receive a salary (a fixed amount earned each month) as opposed to a wage (based on the number of hours or days worked each week or month). Virtually no employee receives cash in the form coins and notes these days; the money is transferred into their bank account.

There are other forms of payment as well:

i. Remuneration in kind: income not paid in money but in some other way, for instance a holiday or a company car.
ii. Claim: an entitlement to benefits or facilities after a set period or after meeting certain conditions, for example an entitlement to a pension.
iii. Facilities: examples are tools, meals or tickets for public transport.
iv. Free reimbursements: amounts paid to an employee to cover costs incurred to perform the work properly.

(G) How is profit from business activities taxed?

Profit earned by those qualifying as a self-employed person or a sole trader is also taxed in Box 1. The profit is calculated in the same way as for corporate entities, although there are a few differences. The self-employed person (ZZP-er) must spend more than 50% of his or her time running the business (minimum 1,225 a year) to be eligible for certain business allowances. Additionally, the carry back period for setting off losses is three years.

(H) Business tax deductions

There are a number of tax deductions (*ondernemersaftrekken*) for those with the fiscal status of self-employed or sole trader (*ondernemer*). These include:

i. the self-employed allowance (*zelfstandigenaftrek*)
ii. the R&D deductions (*aftrek speur- en ontwikkelingswerk*)
iii. the co-operating partner allowance (*meewerkaftrek*) for those whose partner works in the business without receiving proper compensation
iv. the profit exemption for sole traders (14%)

(I) Taxable income from substantial interest (Box 2)

Income from a substantial interest in a company is taxable if the individual (alone or with a fiscal partner) holds directly or indirectly at least 5% of the issued capital in a specific kind of shares or has the right to acquire such an interest. Income is the total of dividends received and proceeds from disposal (profits from the sale of shares, profit-sharing certificates and such) after deduction of costs.

If a taxpayer makes assets available to a company in which he has a substantial interest, the income generated is taxed in Box 1 as income from other activities. One example is renting premises to the company.

For non-resident taxpayers, income from a substantial interest is only subject to tax if that interest is in a company resident in the Netherlands. A company is deemed to be resident in the Netherlands if it was resident for at least five of the last ten years.

(J) Taxable income from savings and investments (Box 3)

The tax levied on income from savings and investments is based on fictitious taxable yield of 4%. In other words, no matter the actual yield (such as interest, dividend, capital gains and losses), it is assumed to be

4% of the net assets' total value. The net assets (the fair market value of the assets after deducting the fair market value of the liabilities) are valued as at 1 January.

Examples of assets and liabilities that fall into Box 3:

i. Savings (e.g. bank deposit accounts)
ii. A second home or a let property
iii. Shares and other securities
iv. Annuity insurances for which the premium is non-deductible
v. An endowment insurance not linked to the taxpayer's own home
vi. Consumer loans

Certain assets are excluded, for example:

vii. Assets used to generate proceeds which are taxed in the Boxes 1 or 2 (such as assets deployed in the business of a self-employed person)
viii. Articles for personal use such as household effects, a passenger car or caravan
ix. Works of art and science not kept as an investment

A taxpayer may not deduct all liabilities in Box 3. For example, the mortgage debt for an owner-occupied dwelling (the interest on this is deductible in Box 1) and tax liabilities (excluding inheritance tax) are not deductible. The first € 2,900 of other liabilities may not be deducted from the assets. If the taxpayer had a fiscal partner throughout the whole year of 2013, a liability threshold of € 5,800 may apply. The income in Box 3 may not be negative, even if the amount of the liability is greater than the amount of the assets.

Box 3 is subject to a tax-free threshold of € 21,139 (tax-exempt capital). Taxpayers entitled to the AOW pension scheme are entitled to an additional threshold up to € 27,984, depending on income and wealth.

Non-resident taxpayers are usually only taxed on profits from real (immovable) property, including rights to such property, located in the Netherlands and from the profit-sharing rights to companies managed in the Netherlands, as long as that profit does not arise from shareholdings or employment.

(K) Income tax return

Income tax returns have to be filed each year with the Tax Administration by 1 April following the relevant tax year. If the Tax Administration does not receive it on time, it sends a reminder and may impose a fine of € 49 - € 344. This means employers must distribute to their employees the annual statement of wages long before 1 April.

It is possible to apply for a deferment. Individuals who file their returns by 1 April receive notification from the Tax Administration by 1 July of the same year. In principle, all tax returns must be filed electronically; a few exceptions may apply.

2.2 Payroll tax (employment tax)

All employees in the Netherlands pay tax on their employment income. This tax has two components: wage tax and social security contributions. Social security contributions help fund the old-age pension scheme (AOW), the survivor benefit scheme (ANW) and the exceptional medical expenses scheme (AWBZ). Since individuals working in the Netherlands are usually entitled to social security benefits, they have to pay social security contributions. An exception may be, for example, someone on (temporary) secondment. If this is the only income employees receive, the wage tax represents their final tax bill.

(A) Are there any exceptions to employment tax?

In short, there are no exceptions. All employees must pay tax and contributions on income earned from employment. The same applies to people receiving social security benefits (the unemployed, the disabled, pensioners, etc). Professional entertainers and professional sportsmen are required to pay wage tax irrespective of whether they are employed or not.

(B) How is employment income tax paid?

The person or company that pays the employer must deduct the tax and contributions from the employee's salary or wage and pay it over to the Tax Administration on a monthly or four-weekly basis. This is known as the wage withholding tax. Basically, it is an advanced levy on an individual's income tax.

The party making the deductions is known as the withholding agent. This includes foreign companies employing individuals whose wages are subject to Dutch income tax. The withholding agent deducts the wage withholding tax when the employee is paid.

(C) Payroll tax return

The withholding agent (i.e. the person or company paying the salary of wages) must file a payroll tax return with the Tax Administration. The payroll tax return combines data relating to wage withholding tax, employees' social security contributions and the income-related Health Care Act premium. The payroll tax return must be filed electronically.

The return must be filed every month, or every 4 weeks, subject to the decision of the company. The deadlines for filing of the returns are stated on the so-called notification for the next year's payroll taxes (aangiftebrief loonheffingen).

In principle it is not possible to extend the deadline for filing the returns. The deadlines for filing of the returns are also stated on the so-called notification for the next year's payroll taxes (aangiftebrief loonheffingen).

(D) Remittance of the Payroll tax due

Payment should be made within one month after the end of the period the payroll tax should be withheld.

(E) Penalty for non-compliance

i. In case of a tax audit, the Dutch Revenue may impose fines of an amount to between 25% and 100% of the amount of tax due if the company failed to pay and withhold payroll taxes. In the event that the failure to pay the payroll taxes is attributable to the gross negligence or intent of the employer, the fine can amount to 100% of the tax due.

ii. Penalties may be imposed for Dutch Payroll tax returns that are incomplete or inaccurate. If the deadline for filing the return has not expired yet, the return can be rectified by filing a correct return or a supplementary payroll tax return. After the deadline is expired, the company must file a correction. In exceptional cases penalties are imposed with a maximum of € 1,230.

iii. In case of late filing a penalty may be imposed of € 61. A period of leniency of 7 days after the ultimate date of filing is taken into account by the Dutch Revenue.

iv. In case of late payment, a penalty of 3% of the amount not paid or too late paid may be imposed, with a minimum of € 50 and a maximum of € 4,920. A period of leniency of 7 days after the ultimate date of payment is taken into account by the Dutch Revenue.

v. In case of intentional omissions penalties can be imposed to a maximum of 100% of the unpaid amount, depending of the specific circumstances of the omission.

(F) Temporary measures / crisis levy

A 16% tax is payable by employers on wages 2013 in excess of € 150,000, meaning that employers must declare and pay the final levy on the wages derived from current employment in 2013 - to the extent exceeding € 150,000 per employee - via the payroll tax return for the period including 31 March 2014.

This crisis tax levy has led to a flood of objections, due to the retroactive effect provided for in the scheme, among other issues. The measure is not expected to apply to tax years after 2013.

(G) Do employees pay wage tax on all their employed income?

An employee pays wage tax on all income received for current or former employment. An example of income from former employment is the payment of a pension.

However, no wage tax is paid on payments not usually seen as earned income. Examples include professional literature or work clothing. In addition, reimbursements or provisions may be partly tax-exempt. For instance, payment of specific travel expenses up to a given limit. On 1 January 2011, new legislation came into force regarding the tax consequences of reimbursement of employment-related costs. For calendar years up to and including 2014, employers may choose between the old and new system.

(H) Lucrative interests

In the event that individuals have acquired shares, receivables or other rights that have to be considered to be granted with the intention of forming a remuneration for services to be rendered by the individual or a related person, these qualify as a so-called 'lucrative interest'.

Income derived from such a lucrative interest will be either:

- taxed as ordinary income at progressive rates up to 52% if the interest is directly held by the individual, or
- as income from a substantial interest at a flat rate of 25% (22% up to € 250,000 for the year 2014) if the interest is held through an entity in which the taxpayer holds an interest of 5% or more (substantial interest).

Shares constitute a lucrative interest if the shares qualify as:

- a subordinate class of shares that constitute less then 10% of the total share capital of the company; and
- preferential shares with entitlement to a preferential dividend of at least 15% per year.

The taxable income from lucrative interests also comprises a (partial) waiver of debts as compensation for work carried out by the individual or a related person. Depending on the specific provisions in a tax treaty, foreign taxpayers will normally be protected against this domestic tax liability pursuant to tax treaties concluded by the Netherlands.

(I) Reducing the wage tax bill for employees

The employer must apply the general tax credit and the employed person's tax credit when calculating the wage withholding tax. Allowances and deductions linked to the employee’s personal circumstances may not be taken into account. This means that an employee still must file an annual income tax return. For many employees, however, the wage withholding tax is the only tax they end up paying because they have no other sources of income and are not eligible for personal deductions and tax-deductible items.

(J) Reducing the wage tax bill for various groups of employees

Employers may be able to reduce the tax and contributions for various groups of employees. Such schemes exist to stimulate professional education and research. There is also a generous 30% tax incentive scheme for employees recruited from abroad and who bring specific skills to the country.

(K) What is the 30% tax-free salary scheme?

The Netherlands has a generous tax incentive scheme for employees recruited from abroad and who bring specific skills to the country.

Employees (expatriates) assigned to work in the Netherlands may apply for 30% of their salary to be tax-exempt. However, there are strict conditions:

i. The employee must come from outside the Netherlands, having been recruited by or seconded to a Dutch employer.
ii. The employee must have a specific expertise that is not available or is scarce in the Netherlands.
iii. The employee must earn above a certain threshold (EUR 35,770 excluding the 30% allowance) for highly skilled migrants, 30 years and over. PhD students and MA graduates are subject to lower thresholds.
iv. No one living within a 150 km zone from the Dutch border qualifies as 'coming from outside the Netherlands'. However, in a current procedure, the Dutch Supreme Court must rule whether this exemption does not conflict with EU legislation. The Advocate General concluded that the 150 kilometre boundary in the 30% ruling does not violate EU law. Recently became clear that the EC considers the 150 km requirement in the 30% facility to be contrary to EU law, and therefore changes in this facility can be expected.
v. Both the employee and the employer must jointly submit the application for the 30% ruling to the Tax Administration within four months of employment commencing.

Extraterritorial costs

The 30% ruling allows the employer to grant a tax-free lump-sum allowance for the extra costs of the employee's stay in the Netherlands (extraterritorial costs). This lump-sum allowance can be no more than 30% of the sum of the wages and the allowance. In order to calculate the maximum allowance, the salary is multiplied by 100/70 and the result then multiplied by 30%.

If actual costs are higher, they may be reimbursed free of tax. School fees for children attending an international school may be reimbursed free of tax in addition to the lump-sum allowance for the extraterritorial costs. Professional costs that cannot be designated as extraterritorial costs may also be reimbursed tax-free in accordance with the normal rules.

Application and duration

Once the application has been approved, the 30% ruling may be applied (retroactively) for a maximum of 96 months, including any extension. This period is reduced by the length of earlier stays or periods of employment in the Netherlands during the previous 25 years. An employee coming to the Netherlands may ask to be deemed partially non-resident for income tax purposes.

Dutch employees

Dutch employees seconded to designated countries overseas may also be eligible for the 30% ruling under certain conditions. The employer must be liable to withhold wage tax in the Netherlands. Employees are deemed seconded employees if they spend at least 45 days in a 12-month period in one or more places to which he has been seconded, in the context of his job.

3. Value added tax (VAT)

Value added tax (VAT) is charged on most goods and services that VAT-registered businesses provide in the Netherlands. It is also charged on goods and some services that are imported from countries outside the European Union (EU) and on goods that brought into the Netherlands from other EU countries.

3.1 When is VAT charged?

VAT is levied at each stage in the supply chain, from the factory all the way through to the shop. In other words, this tax is charged whenever a VAT-registered business sells to another business or to a non-business customer (output tax). However, when VAT-registered businesses buy goods or services, they can generally reclaim the VAT they have paid (input tax).

Periodically (usually monthly or quarterly), the VAT-registered business pays over the VAT balance to the Tax Administration, assuming output tax exceeds input tax. If it is the other way round, a refund is requested. End-consumers are not usually VAT-registered so they cannot claim the VAT back. Effectively, VAT-registered businesses act as a tax collector for the Dutch government.

In the Netherlands, VAT is known as BTW, which stands for *Belasting over de Toegevoegde Waarde* (literally 'tax on the added value').

3.2 Who must register for VAT?

Any individual or business providing goods and services that are 'taxable supplies' must register for VAT. This means having to charge VAT on any goods and services provided in the Netherlands. VAT is charged on the full sale price.

A group of taxpayers may form a fiscal unity for VAT purposes. In such cases, the supply of goods and services within the unity is not subject to VAT. A government institution does not normally have to register for VAT, unless its activities are not public sector ones.

3.3 What is subject to VAT?

VAT is charged on all taxable supplies. There are five categories of taxable supplies:

(A) The supply of goods by a company
(B) The supply of services by a company
(C) The acquisition of goods by a company from other EU country[16]
(D) The import of goods from outside the EU
(E) The acquisition of new and almost new means of transport (motor vehicles, ships and aircraft) by an individual from another EU country

3.4 The supply of goods and services

The phrase 'supply of goods' is given a broad interpretation. Goods are physical objects, but also include items such as electricity. In addition to goods sold to customers in the normal course of business, VAT is charged on:

[16] Goods imported from another EU country are known technically as acquisitions.

(A) items sold to staff, such as canteen meals or via vending machines
(B) sales of business assets
(C) hiring or lending goods to someone else
(D) goods made from the materials supplied by the customer
(E) certain business gifts
(F) goods taken out of the business for personal use, whether temporary or permanent

The phrase 'supply of services' is defined as all activities which do not include the supply of goods and which are performed for payment. The use of self-manufactured goods is also considered as a service.

As of 1 January 2014, the so-called adjustment payment (integratieheffing) is abolished. This levy was designed to adjust VAT imposed in the event of the manufacturing of own movable or immovable property. This change is especially relevant in case new rental homes are built.

3.5 Place of supply of goods and services

The difference between the supply of goods and the supply of services may seem theoretical, but there is a valid reason for distinguishing between them. The 'place of supply' determines which country's VAT rules apply, that is to say where VAT is charged and paid. The place of supply depends, first and foremost, on whether the taxable supply refers to goods or services.

With goods, the place of supply is usually straightforward. It is the place the goods are located at the time of supply (i.e. where the goods are purchased by the customer). However, if goods are dispatched or transported, the place of supply is the place where transport begins. Another exception is the successive supply of imported goods[17]; the place of total supply is the Netherlands.

With services, identifying the place of supply is more complicated, especially now many businesses are supplying cross-border services. Generally, the location is considered the place of residence of the person providing Business-to-Consumer (B2C) services. However, for Business-to-Business (B2B) services, the location is generally the place of establishment of the business buying the services. Services involving immovable property are supplied at the place where the property is located.

3.6 VAT rates

The basic VAT rate in the Netherlands is 21%. A reduced rate of 6% applies to the supply, import and intra-EU acquisition of goods and services listed in Table I of the 1968 VAT Act (mainly foods and medicines). Other goods and services subject to the lower rate include water, art, books, newspapers and magazines, devices for the visually handicapped, artificial limbs, certain goods and services for agricultural use, passenger transport, sports, hotel accommodation, some labour-intensive services and entrance fees for stage performances, museums, cinemas, sports events, amusement parks, zoos and circuses.

A rate of 0% is levied primarily on goods exported from the EU, sea-going vessels and aircraft used for international transport, gold destined for central banks, and all activities that take place in certain types of bonded warehouse.

[17] Goods supplied under any agreement that provides for periodic payments.

Goods transported to other EU countries are also zero-rated under the reverse charge mechanism operating in the EU.

3.7 Exemptions

Several types of transactions are VAT-exempt, which means that tax may not be charged on these transactions and that the VAT on purchased relating to these transactions may not be claimed back. Exemptions apply to transactions such as:

(A) The transfer or rental of immovable property[18]
(B) Medical services
(C) Services provided by educational establishments
(D) Socio-cultural performances
(E) Most banking services
(F) Insurance transactions
(G) Non-commercial activities of public broadcasting organisations
(H) Certain postal services
(I) Burials and cremations
(J) Services for member of sports organisations (e.g. not entrance fees)
(K) Services provided by composers, writers and journalists
(L) Home care services.

3.8 Special arrangements for small businesses and the agricultural sector

Small businesses (natural persons) enjoy a tax reduction. If the VAT payable after the deduction of prepaid tax is less than € 1,883, an amount may be deducted; if the balance is less than € 1,345, no VAT liability exists. If a small business continues to be exempt from the obligation to pay VAT, it can apply to be exempted from the obligation to maintain accounting records for VAT.

A special provision applies to the agricultural sector (which includes arable farming, stockbreeding and horticulture), designed to exclude the agricultural sector from the VAT system. Farmers do not charge VAT and are not entitled to deduct any previously paid VAT. Companies purchasing agricultural products from these farmers enjoy a fixed flat rate deduction of 5.4%. If the tax prepaid by the farmer is structurally more than 5.4% of sales, this special provision puts either the farmer or the customers at a disadvantage. In such cases, the farmer may opt for the normal statutory scheme.

3.9 How does VAT work in the single European market?

Since the introduction of the single European market (EU) on 1 January 1993, persons, goods, services and capital move freely within its borders. The main arrangements for VAT are as follows:

(A) If a VAT-registered business in one EU country supplies and delivers goods to a non-registered customer in another EU country (known as distance selling[19]), VAT is charged at the rate applicable in the seller's country. This is the country of origin principle.
(B) If the business's distance sales to a particular country go over the distance-selling threshold of usually € 35,000 - € 100,000, the business must register for VAT in the destination country. The business then

[18] Exceptions apply, including newly built property for first two years of use.
[19] Distance selling relates only to goods and not services.

charges VAT at the rate of the destination country instead of its own country's rate. This is the country of destination principle.

(C) Trade between companies in different EU countries also charges VAT using the country of destination principle. However, under the reverse charge mechanism [20], the business supplying the goods charges 0% and the business receiving the goods submits a tax return for goods purchased in another EU country.

(D) The country of destination principle always applies to the purchase of new, or nearly new, means of transport by private individuals or non-registered companies.

(E) Every company supplying goods and certain services to another EU country must submit regular notices to the Tax Administration listing the supplies subject to VAT in that country. This is known as the EC Sales List. This list shows details of each EU customer, including their VAT number and the value of the supplies made.

(F) Since border controls for tax purposes are no longer carried out within the EU, the levying of VAT on imports and the charging of the zero rate on exports apply only to goods coming from or going to non-EU countries.

3.10 Imports

Imports are defined as goods brought into free circulation within the Netherlands from countries outside the EU. These goods are subject to import VAT. This is charged as a percentage of the total value of goods plus any other duties payable[21]. The rate is the same as that used when supplying goods in the Netherlands.

VAT is charged in one of two ways. The first is to charge and pay tax at the moment of importation. The buyer submits an import declaration when going through customs procedures and pays the VAT to the authorities. The buyer may be required to provide a guarantee (security) for this purpose. The second is to defer the payment of VAT to when the company receiving the goods (the customer) submits its periodic domestic VAT return. This situation is known as 'import transfer'. Transfer regulations apply automatically to certain goods. For other goods, the tax inspector can issue a license on request.

3.11 Invoicing

Since 1 January 2004, all invoices must state the VAT identification number of the company or business person supplying taxable goods or services. A VAT identification number is allocated when registering for VAT and is used for all transactions within the EU. In the case of a fiscal unity, the VAT identification number of the fiscal unity's branch must be given on the invoice. This obligation also applies under the 'domestic transfer' regulation, when VAT payable is imposed on the customer instead of the supplier. Invoices must also state any exemptions, application of the margin scheme, reverse charge and intra-EU transactions.

[20] The aim of the reverse charge is to make purchasing decisions 'VAT neutral' and to avoid the need for suppliers to register for VAT in multiple EU countries.

[21] Bringing goods into the Netherlands from abroad, including over the internet, may also be subject to Customs Duty and Excise Duty.

3.12 How is VAT declared and paid?

VAT is declared and paid using a self-assessment system. The VAT-registered company or business person electronically files periodic VAT returns on the web site of the tax authorities, Usually, starting enterprises file their first returns on forms provided by the tax authorities. If these forms are not provided automatically, the form must be requested. The Tax Administration is strict when it comes to declaring and paying VAT.

If goods have been supplied within the European Union, the form for filing intra-EU supplies (*Opgaaf Intracommunautaire Leveringen*) must also be completed. Both the return and the form are completed and filed electronically.

VAT returns may be filed monthly, quarterly or annually, depending on the amount of VAT paid.

VAT payable	**Filing**
> € 15,000 / month	Monthly
€ 1,883 < amount due < € 15,000	Quarterly
< € 1,883 per year	Annually

Monthly and quarterly returns must be filed with the Tax Administration within one month of the end of the assessment period and the payment must be paid to the Tax Administration's account within the same period. Those filing or paying late risk being fined. As of 2011, under certain conditions, a seven-day period may apply regarding omission penalties. When the return regards a calender year, filing and payment must take place by 31 March of the following year. It is not possible to extend the deadline for filing a VAT return.

The Tax Administration checks afterwards, on the basis of the business's bookkeeping records, whether the correct amounts have been declared and paid. A business may deduct VAT paid on goods purchased for business purposes as long as these goods are used for (VAT) taxable activities.

3.13 Refunds of VAT

When the filing of a VAT return results in a refundable position (the input VAT exceeds the VAT payable in a certain period) this refund will be paid automatically by the tax authorities, usually within four weeks. In specific situations, e.g. very substantial refunds, deviating from a normal situation, additional information (invoices) may be requested for by the tax authorities.

3.14 Penalty for non-compliance

When VAT returns are filed late or not at all, or payment of the VAT due has been late, penalties can be imposed. These penalties differ depending on whether the offend concerns late filing of the return or the late payment of the VAT due.

The penalty for late filing amounts € 62 - € 123, the penalty for late payment amounts 3% of the unpaid amount with a minimum of € 50, regardless of the period of delay.

In case of intentional omissions penalties can be imposed to a maximum of 100% of the unpaid amount, depending of the specific circumstances of the omission.

3.15 **EU Sales Listings**

(A) Purpose of EU sales listings.

The EU sales listings are used by the Dutch tax authorities for two purposes.

The first, this information is used to verify whether the supplier from the goods has correctly applied the 0% Dutch VAT rate on the EU cross border shipment of goods and to verify whether the EU cross border supply of goods is correctly charged without VAT.

Secondly, the information is used to inform the tax authorities in other EU countries regarding the EU cross border movement of goods and services. The tax authorities in the corresponding EU countries may use this information to verify whether the recipients of the goods and services have complied with their VAT obligations.

(B) Which company is required to file the EU sales listings?

In general a company is required to submit an EU sales listing if it has:

i. Carries out EU cross border supplies of goods that are subject to 0% Dutch VAT;
ii. transported its own goods to another EU country that are subject to 0% Dutch VAT;
iii. rendered services from the Netherlands to a customer in another EU country that are taxable in that other EU country.

The listings has to be filed on a monthly basis if the value of the goods exceeds € 100.000 in a certain calendar quarter. Below this threshold the listings may be submitted on a quarterly basis. This threshold should be verified on a continuous basis.

To the choice of of the company the EU sales listings for services can be submitted on a calendar monthly or calendar quarterly basis. In case filing of the listing is late, monthly filing of the listing is mandatory.

Under strict rules, a yearly filing is possible upon request.

(C) Filing procedure

The EU sales listings should be filed electronically if the company is established in the Netherlands, has a Dutch permanent establishment or has appointed a Dutch fiscal representative. Otherwise the company should file the paper based EU sales listings.

The electronic EU Sales listings should be received by the Dutch tax authorities on the last day of the month following the relevant tax period (calendar month or quarter) at the latest. The paper based EU sales listings should be received by the Dutch tax authorities on the last day of the second

month following the relevant tax period (calendar month or quarter) at the latest.
When these listings are filed late or incorrectly a penalty up to € 4,920 can be imposed.

(D) Other, Intrastat Reports

Beside the EU sales listings, statistical information must be provided to CBS (Dutch Central Bureau of Statistics) in Heerlen if the value of cross border supplies of goods exceeds € 900,000 per year. If and as soon as the threshold is exceeded the company is required to file the Intrastat declarations. In addition to that the obligation to file the Intrastat declaration also applies for the following year.

The declaration must be filed on a calendar monthly basis and can only be submitted electronically. The deadline for filing the declaration is 10 days after the end of the calendar month.

The penalty for non-compliance with the regulations with respect to Intrastat reports is € 5,000 regardless of the offend.

4. International aspects of taxation in the Netherlands

No matter where you live in the world, if you receive income that originates in the Netherlands, you will probably have to pay tax on that income. This applies to individuals and companies alike. Of course, aspects like residency and source of income will determine whether and how much tax is due and whether there are any exemptions. Below, we outline some of those key aspects.

4.1 How does residency affect taxation?

(A) Resident taxpayers

Individuals resident in the Netherlands have to pay income tax on their worldwide income. Likewise, companies established and/or resident for tax purposes in the Netherlands pay corporate income tax on their worldwide profits.

(B) Non-resident taxpayers

Individuals who do not live in the Netherlands have to pay income tax on income arising in the Netherlands. When certain provisions are met, these individuals may elect to be treated as resident taxpayers if they so wish. Companies resident outside the Netherlands are subject to corporate income tax on their taxable profits from certain sources in the Netherlands.

This current regime is expected to be abolished on 1 January 2015. The Cabinet has proposed to replace the current regime with a new regime, which only will apply to non-resident taxpayers residing in the EU, the EEA, Switzerland and Bonaire / Aruba/ St. Eustatius, provided that 90% or more if the income earned is subject to Dutch income tax or payroll tax. Under the application of the new regime, the taxpayer is entitled to the same deductible items and tax rebates as resident taxpayers.

(C) How can resident taxpayers avoid double taxation?

To prevent resident taxpayers being taxed twice on income or profits that are already taxed abroad, the Netherlands has entered into bilateral tax treaties with a large number of countries. Where no treaty has been concluded or where a tax treaty does not include a specific provision, the Netherlands has drawn up unilateral provisions. These are contained in the 2001 Unilateral Decree on the Avoidance of Double Taxation.

Treaties are covered in more detail below. First however, we will look at the methods used to reduce or eliminate double taxation.

4.2 Avoidance of double taxation

There are various methods to avoid double taxation of income in cross-border situations. These methods are included in both Dutch domestic legislation and the applicable agreements for the avoidance of double taxation.

(A) The exemption method

The exemption method usually applies to the foreign element of income, in other words, income that does not arise in the Netherlands. Dutch tax on worldwide income is reduced by the Dutch tax relating to that foreign income that is included in the worldwide taxable income. The exemption is applied on a 'box' or income category basis for individuals.

For personal income tax purposes, an advantage of the 'exemption with progression' method is that foreign losses can be set off against Dutch positive income or profits arising in the same year, effectively reducing the Dutch tax bill. If the foreign income or profits exceed total income or profits, perhaps because the 'domestic income' is negative, the exemption may not be (fully) granted in the year in question. In such cases, the total amount of the foreign-sourced income and the 'excess' of the exemption may be carried forward to reduce tax in subsequent years. For corporate income tax purposes, as of 1 January 2012 an exemption for foreign branches is introduced (see below)

(B) The credit method

The credit method is used for foreign withheld tax on income from investments, in developing countries designated by the 2001 Unilateral Decree on the Avoidance of Double Taxation. Examples of income from investments are dividends, interest and royalties. The Dutch tax is reduced by either the foreign tax levied or the Dutch tax payable on the foreign investment income, whichever is lower.

Since foreign withholding taxes are usually levied on a gross basis, while Dutch income tax is levied on a net basis (after deduction of costs), it is quite possible that the Dutch tax will not be sufficient to provide full credit for the tax levied by the source country. In such cases, the excess may be 'carried forward' to subsequent years.

Under the treaties aimed at avoiding double taxation, the credit method may be applied to the income on a country-by-country or, on approval by the State Secretary of Finance, the total of all foreign income from all relevant countries.

(C) Deduction as costs

When there are no arrangements for avoiding double taxation, foreign taxes may be deducted as costs from the relevant income. This option

applies to the year in which the (corporate) income is received and to the total amount of dividends, royalties and interest received in that year.

Individuals may elect to deduct the costs from income in Box 1 or Box 2. Costs may not be deducted from Box 3 income. In situations in which a credit would normally be granted for dividends, interest and royalties, the taxpayer may opt for non-recognition of the tax credit. This is particularly advantageous if the foreign tax cannot be fully credited that year because it is higher than the amount to be paid in the Netherlands.

(D) Exemption for foreign branches

For the fiscal years up to and including 2011, the losses of the foreign branch of a Dutch registered company were tax deductible from the taxable profits of the Dutch registered company; in case of profits generally the aforementioned exemption method applied.

As of 1 January 2012, a new system for avoidance of double taxation is introduced in the Dutch Corporate Income Tax Act 1969. As a consequence, the taxable income from foreign branches (loss or profit) is excluded from the worldwide income of the Dutch company. Therefore startup losses of a foreign branch cannot longer be 'imported' in order to reduce the overall tax burden.

The exemption is not applicable to so-called low-taxed foreign investment branches.

4.3 Bilateral tax treaties

(A) Outline of Dutch policy

Bilateral tax treaties give the right to levy taxes on certain income or profit to one of the two countries in question. This means that (corporate) income tax is levied by one country only and the other country reduces the tax to avoid double taxation. Dutch policy on concluding treaties to avoid double taxation is largely in line with the principles laid down in the OECD Model Tax Convention.

The reasons for negotiating tax treaties are various. The Dutch economy is an open one, with a small domestic market and a large foreign market. This means that a relatively large number of industrial and commercial companies operate on a mainly international basis. The country's policy on tax treaties reflects this openness in its relationships with EU Member States and with other countries. Dutch policy is to remove obstacles to the international flow of goods and capital, in this case double taxation.

To encourage international investment, tax on dividends, interest and royalties flowing from one country to another should be as low as possible, and preferably zero per cent. In line with this policy, Dutch

legislation does not require withholding tax to be levied on outbound interest and royalties.

The Netherlands also tries to guarantee a neutral investment climate for capital import. As a result, Dutch investors can invest in foreign markets on the same terms as other foreign or domestic investors. Therefore, all profits received by a Dutch parent company from a foreign subsidiary or made through a permanent establishment situated abroad are exempt from taxation in the Netherlands when certain requirements are fulfilled. This ensures these profits are taxed only in the source country, i.e. where the activities are performed, at the same country's tax rate.

(B) Treaties to avoid double taxation

The Netherlands has signed many treaties on double taxation of income. Some older treaties deal with the double taxation of wealth as well (per 1 January 2014):

Albania
Argentina
Armenia
Australia
Aruba
Austria
Azerbaijan
Bangladesh
Bahrain
Barbados
Belarus (White Russia)
Belgium
Bermuda
BES Islands
Brazil
Bulgaria
Canada
China (P.R.C.)
Croatia
Curacao
St. Martin
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Ghana
Hungary
Iceland
India
Indonesia
Israel
Ireland
Italy
Japan
Jordan
Kazakhstan
Korea (Rep.)
Kuwait
Latvia
Lithuania
Luxembourg
Macedonia
Malawi (- 1/1/2014)
Malaysia
Malta
Mexico
Moldova
Morocco
Mongolia (- 1/1/2014)
New Zealand
Nigeria
Norway
Oman
Pakistan
Panama
Philippines
Qatar
Romania
Russian Federation
Saudi Arabia
Singapore
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Surinam
Sweden
Switzerland
Thailand
Tunisia
Turkey
UAE
Uganda
UK
Ukraine
USA
Uzbekistan
Venezuela
Vietnam
Yugoslavia
Zambia
Zimbabwe

Greece	Poland
Hong Kong	Portugal

There is also an arrangement between the Netherlands Trade and Investment Office in Taipei and the Taipei Representative Office in the Netherlands regarding the avoidance of double taxation. Tax relations between the Netherlands, Curacao, St. Martin and Aruba are regulated in the Taxation Agreement of the Kingdom of the Netherlands. Tax relations between Bonaire, Saba, St Eustatius (BES Islands) and the Netherlands are regulated by the Tax Regulation Netherlands (TRN).

Treaties to avoid the double taxation of inheritance are in force with Austria, Finland, Israel, Sweden, Switzerland, the United Kingdom and the United States of America. The Taxation Agreement of the Kingdom of the Netherlands also contains provisions on inheritance tax. The treaties with Austria, the Netherlands Antilles and the United Kingdom cover gift taxes as well.

(C) Relief of taxation at source under tax treaties

Generally, tax treaties give individuals and entities the right to relief on dividends, interest and royalties taxed at source. To implement the relief, a distinction is made between foreign regulations for taxpayers resident or established in the Netherlands and Dutch regulations for taxpayers resident or established in treaty countries. These implementation regulations are published in the Netherlands Government Gazette. The Netherlands taxes only dividends at source (dividend tax), so there is no tax at source on interest and royalties.

The general rule for relief of dividend tax in the Netherlands is the exemption method: a reduced rate of dividend tax on the dividend distribution. There is also a refund procedure: the excess amount of withheld dividend tax is refunded. Treaty countries also apply both methods. Whether it is possible to use both methods or just the tax refund depends on the implementation regulations. These regulations also set out whether (and which) forms should be used for the relief of source taxation. Both Dutch and foreign forms are available free of charge to interested parties.

4.4 Do non-resident taxpayers pay tax on all their Dutch income?

Under Dutch law, non-resident taxpayers must pay Dutch (corporate) income tax on income or profits arising from the sources listed below. If a non-resident taxpayer lives in a country that has a tax treaty with the Netherlands, taxation will occur in the Netherlands only if the treaty confers to the Netherlands the right to tax that income.

(A) Individuals

Non-resident individuals pay Dutch income tax on the following types of income:

Taxable income from work and dwellings in the Netherlands

i. Taxable profits of a business permanently established or permanently represented in the Netherlands (a Dutch enterprise) [22]
ii. Taxable salary from work performed in the Netherlands
iii. Taxable income from other activities performed in the Netherlands (e.g. freelance work)
iv. Periodic benefits in cash or in kind:
    - if the contributions were deducted from tax in the Netherlands
    - from a pension scheme to which a Dutch enterprise has paid contributions
v. Rights to periodic benefits in cash or kind under public law, paid by or on behalf of a Dutch public legal entity (e.g. a municipality
vi. Taxable income from home ownership in the Netherlands (less standard deductions)

Taxable income from a substantial interest in a company established in the Netherlands

Income includes dividends received and capital gains. The criteria for substantial interest are the same as for resident taxpayers.

Taxable income from savings and investments in the Netherlands

Tax is levied on the taxpayer's net assets in the Netherlands (i.e. assets less liabilities connected with these Dutch assets). Assets in the Netherlands are:

vii. Real (immovable) property in the Netherlands
viii. Direct or indirect rights to real property in the Netherlands
ix. Rights to participate in the profit of an enterprise managed in the Netherlands, insofar as they do not arise from shareholdings or employment and have not been taxed based on previous sources

Under certain condition, non-resident individuals may elect to be treated as resident taxpayers. This means they would be taxed on their worldwide income, but also entitled to the deductions and levy rebates available to resident taxpayers.

[22] The Dutch Income Tax Act 2001 does not define the terms 'Dutch enterprise'. However, a definition can be found in the Dutch Unilateral Rules for the Avoidance of Double Taxation which can be used as a guideline.

(B) Companies

Non-resident companies are subject to corporate income tax only on certain Dutch source income, including:

i. Business income from a Dutch permanent establishment or permanent representative;
ii. Income from real estate located in The Netherlands;
iii. Income from profit-sharing rights in a Dutch business;
iv. Income from substantial shareholdings (that is, 5% or more of the nominal paid-up share capital) in a Dutch resident company, which does not qualify as a tax exempt portfolio investment entity, provided the shares held in that company do not form part of the shareholder's enterprise and the main purpose is not tax evasion;
v. Income from loans to a Dutch resident company if the creditor has a substantial interest in that company and the shares in that company do not form part of an enterprise of the creditor/shareholder.

However, the above-mentioned taxable income and profits may be limited or exempt (not taxed) from Dutch corporate income tax under the participation exemption and the tax treaties that The Netherlands has concluded with other countries.

5. Certainty in advance for international groups & investors (rulings)

To stimulate entrepreneurship and foreign investment, the Dutch Tax Administration is more than willing to discuss tax issues in advance. This is a real incentive for international companies and large investors.

Rulings are often requested for by royalty and financing companies (service companies) and holding companies. As of 1 January 2014, new legislation entered into force regarding the substance requirements which these service companies must comply with. If these requirements are not met, the Dutch tax authorities will actively inform foreign tax authorities.

5.1 Substance requirements

The new substance requirements for service companies are as follows:

i. At least half of the total number of board members is resident or established in the Netherlands;
ii. the Dutch resident board members have sufficient professional knowledge to perform their duties;
iii. the company disposes of qualified staff to implement and register its transactions;
iv. the management decisions are taken in the Netherlands;
v. the (main) bank accounts are held in the Netherlands;
vi. the bookkeeping is done in the Netherlands;
vii. the business address of the company is in the Netherlands;
viii. the company is, to the best of its knowledge, not considered as a resident for tax purposes in another country;
ix. the company is, with respect to the loans, interest, royalty's, rent and terms of lease exposed to sufficient economic risks according to article 8c of the Dutch Corporate Income Tax Act 1969;
x. the company has an equity that is considered appropriate in view of its activities.

5.2 Advance Pricing Agreement

Based on the Dutch Corporate Income Tax Act 1969, all corporate tax payers must have sufficient documentation on how prices and conditions of intra-group transactions are determined. Therefore, transfer prices (the charges made between companies within the same group), are looked at keenly by any tax administration since they can have a significant impact on pre-tax profits or losses.

Any accusation of not applying the arm’s length principle is defended fiercely by companies. Consequently, transfer-pricing disputes can be lengthy and costly. When the documentation requirements are not met, the burden of proof (that the applied prices are correct) shifts from the tax inspector to the tax payer.

In an effort to resolve or avoid actual or potential disputes, the taxpayer can go to the tax authorities and arrange advance certainty of the fiscal acceptability of its intra-group prices.
The Dutch Tax Administration has a team in Rotterdam that deals with transfer pricing and Advance Pricing Agreements (APA). An APA agreement is a binding agreement between the taxpayer and the tax administration on a suitable transfer pricing methodology.

5.3 Advance Tax Ruling

The Dutch Tax Administration can provide Advance Tax Rulings (ATR) on the Dutch tax treatment of specific facts and circumstances for international companies. The ATR team in Rotterdam draws up agreements that provide advance certainty of issues such as the application of the participation exemption and the tax consequences of certain organisation structures (e.g. hybrid entities).

It is expected that also holding companies must comply with aforementioned substance requirements in order to be able to request for an Advance Tax Ruling.

5.4 International Investors' Desk

If foreign investors want to know the tax consequences of making an initial investment of more than EUR 4.5 million in the Netherlands, they can contact the International Investors' Desk (APBI) of the Dutch Tax Administration. The APBI is authorised to provide advance certainty, within the context of the law, case law and policy, on a range of issues. Example of these issues are corporate income tax, wage withholding tax, dividend tax, income tax, value added tax and capital transfer tax. The APBI, which is based in Rotterdam, also acts as the point of contact for import duties and excise duties.

6. Other taxes

6.1 Custom duties

Customs duty is a tax charged on the importation of goods produced outside the European Union (EU). It is charged by all Member States of the European Union. The term 'custom duties' covers other import charges such as anti-dumping duties. The Dutch customs authorities are responsible for levying these duties upon importation and charged with enforcing a considerable number of prohibitions, restrictions and control measures.

(A) Who pays custom duties?

In principle, anyone bringing goods into the EU must pay custom duties. That can be a private individual or a commercial entity. However, individuals may bring in a certain amount of duty/tax free goods for personal use - known as an allowance. Once all import formalities have been completed and any customs duties or equivalent charges have been paid, the goods are considered to be 'in free circulation'. This means the goods are given the status of Community goods, which entitles them to be freely circulated within the internal market of the European Union. Import duties are usually paid by the declarant when submitting the customs declaration for free circulation. However, many importers prefer using the professional skills and credit facilities of customs representatives, who take care of all of the obligations relating to the import of goods.

(B) How much is custom duty?

The amount of customs duty charged depends on the type of goods imported and the value stated on the customs declaration. The percentage varies depending on the type of goods and their country of origin. Duty is charged on:

i. the price paid for the goods, plus
ii. any local sales taxes, plus
iii. shipping and insurance

This means the rates of custom duty vary considerably. For example, duty charged on raw materials is usually lower than that charged on finished products.

(C) What if the goods are re-exported?

The final destination of goods brought into the European Union is not always known. Sometimes, the goods will be re-exported. Therefore, European procedures are in place to allow postponing the payment of import duties. This takes place by storing goods under customs supervision and in accordance with customs procedures. The goods are normally placed in an approved temporary storage facility operated by the importer, the storage keeper or the customs authorities. The goods must be

assigned a customs-approved treatment or use within designated time limits [23]. Other forms of customs approved treatment are temporary import and inward processing. Obviously, import duties have to be paid once the conditions for these procedures are no longer met.

(D) What are the customs procedures?

The Dutch customs authorities do their best to use the possibilities provided by European legislation to facilitate the movement of goods, while still maintaining an adequate level of customs control. Whenever possible, an integrated approach is taken. The following are examples of this approach.

(E) Frequent use of simplified procedures

Simplified procedures are available for all the procedures mentioned above. The Dutch customs authorities are willing to accept approved accounting records kept for commercial purposes as the basis for control. This avoids double administration. Examination of accounting records is, of course, combined with a physical examination of the goods wherever necessary. This system has proved effective in practice.

(F) Combined simplified procedures

Sufficiently well-organised companies with automated accounts may apply for combined simplified procedures (e.g. warehousing based on accounting records combined with simplified procedures for transport to and from the warehouse in question).

(G) Agreement in the form of a Memorandum of Understanding (MoU)

The Dutch customs authorities base their control largely on risk analyses, which are most effective when companies are willing to provide the authorities with all available documentation, commercial and non-commercial, needed to assess the risks involved. Therefore, the authorities are prepared to agree an MoU with such companies. In effect, the companies can simplify their customs treatment. The MoU imposes a duty on the authorities to review regularly the customs procedures for the business in question with a view to further simplifying the treatment of the companies involved.

6.2 Dividend withholding tax

Many enterprises operate as a public limited company (N.V.) or a private limited company (B.V.). The company's capital comes from its owners (the shareholders), who in return receive shares. Whenever the company makes a

[23] 45 days from the date on which the summary declaration is lodged in the case of goods carried by sea; otherwise 20 days (http://ec.europa.eu/taxation_customs)

profit, it may distribute part of this profit to its shareholders. This is usually done in the form of a dividend.

A company distributing dividends is required to withhold tax at a rate of 15% on the value of these dividends and pay this dividend tax to the Tax Administration. Consequently, shareholders receive only 85% of the dividend. Just like the wage tax, the dividend withholding tax may be set off against income tax payable. Dividend withholding tax is effectively an advance levy.

When distributing dividends to a (foreign) entity, in principle a dividend tax of 15% applies. However, there are a number of exceptions. If the company distributes a dividend to an entity whose shares are subject to the participation exemption scheme and this participation belongs to a company run in the Netherlands, the dividend payment is exempt from dividend tax.

Dutch companies no longer have to withhold dividend tax if the dividend is paid to a company having its registered office in another EU country, provided the receiving company has an interest of at least 5% in the Dutch company. This exemption does not apply to non-resident individuals or companies not established in the Netherlands. However, a dividend tax lower than the 15% often applies under tax treaties concluded by The Netherlands.

Cooperatives

The Dutch cooperative association (Coop) has become an increasingly popular vehicle for structuring fund investments and acting as a group holding company, due to the favourable Dutch tax treatment it receives and its flexibility from a Dutch legal perspective.

An investor in a Coop is not subject to Dutch corporate income tax and profit distributions are not subject to withholding tax, except in abusive situations.

Dutch dividend withholding tax will be payable on profit distributions by a Coop if:

- the Coop directly or indirectly owns shares in a company with the main purpose (or one of the main purposes) of avoiding Dutch dividend withholding tax or non-Dutch taxation of another person and
- the membership interest in the Coop directly or indirectly held by that other person cannot be allocated to the business enterprise of the member.

In order to be eligible for advance certainty from the tax authorities, minimal substance is required. However, the source country may require more substance before treaty access, and thereby reduction of withholding tax, is granted.

6.3 Withholding tax on interest

There is no withholding tax on interest other than on certain hybrid loans.

6.4 Withholding tax on royalties

There is no withholding tax on royalties..

6.5 Inheritance tax and gift tax

The Inheritance Tax Act distinguishes between two different taxes: inheritance tax and gift tax.

(A) Inheritance tax

Inheritance tax is paid on the value of everything acquired from the estate (i.e. total value of money and property) of a person who has died and whose last place of residence was situated in the Netherlands. Spouse, children and close relatives pay less tax than distant relatives or non-relatives pay.

Substantial amounts are exempt from inheritance tax. Exemptions exist for property inherited by spouses, unmarried couples living together who satisfy certain conditions, children, handicapped children, parents, other blood relatives, public entities serving a social or general interest in the Netherlands and other cases of inheritance. A number of these cases are subject to further conditions for the application of the exemption. Pension entitlements are deducted in full or in part from the exemption of some beneficiaries. Inheritance tax is levied on the taxable part of the property acquired (= property acquired less exemption). There is a minimum and a maximum percentage, depending on the value of the property acquired. The Inheritance Tax Act draws a distinction between the following categories:

i. Spouses, children and unmarried couples living together are subject to a minimum rate of 10% and a maximum of 20%.
ii. For all other beneficiaries, the minimum rate is 30% and the maximum is 40%.
iii. Full exemption applies (when certain requirements are met) to property inherited by religious, ideological, charitable, cultural, scientific or public entities serving a social or general interest in the Netherlands.

(B) Gift tax

Gift tax is paid on the value of anything received by way of a gift from an individual resident in the Netherlands. The rates are the same as those for inheritance tax. Again, some amounts are exempt from gift tax, such as gifts made by parents to children. As with inheritance tax, exemption is subject to further conditions in a number of cases. The recipient of the gift is liable fort he Gift tax due.

6.6 **Real estate transfer tax**

Real estate transfer tax is levied when real estate (or deemed real estate, e.g. real estate companies) are acquired. The applicable tax rate is 2% for homes, and 6% for offices and other real estate not used to live in.

The tax base is the fair market value of the real estate, with a minimum of the purchase price paid.

7. Annual financial statements

The annual financial statements are the basis for determining the corporate income tax liability.

7.1 General

These statements normally comprise three parts:

i. Annual report (directors report)
ii. Annual accounts (balance sheet, profit and loss account, cash flow statement and notes to the balance sheet and the profit and loss account)
iii. Other information (auditors opinion, proposed appropriation of the result of the year etc.)

7.2 Requirements

All companies are required to prepare and file the annual financial statements regardless of the size of the company. However, small sized companies are required to only file the balance sheet and the notes to the balance sheet amongst the contents in the annual financial statements.

Whether a company is considered small, medium or large, depends on the turnover, value of the assets and the number of employees. It should satisfy at least two out of three of the following criteria for that size, for two consecutive years:

Criteria	Small	Medium	Large
Net Turnover	≤8,800 K	8,800 K< … ≤ 35,000K	> 35,000 K
Total Assets	≤4,400 K	4,400 K< … ≤ 17,500K	> 17,500K
Employees	<50	50≤ … <250	≥ 250

Medium sized and large companies require an audit of their financial accounts. Small sized companies are exempt from audit of their financial accounts.

7.3 Deadline for filing financial statements

The timetable for filing is summarized below:

Step	Time frame	Possible extension
Preparation of financial statement	5 months after year-end	11 months after year-end
Adoption of accounts by general shareholders meeting	Within 2 months after the preparation	
Filing of the accounts ate the Chamber of Commerce	8 days after the adoption by the general meeting of shareholders	13 months after year-end

The directors of the company are responsible for filing the annual financial statements by sending it to the Chamber of Commerce for the city in which the company has its statutory seat.

In case of non-compliance, a fine may be imposed to the directors, as well as six months imprisonment for the directors (the latter only in case of intentional fraud). Further, where the statutory requirements to prepare and file the accounts not have been met and the company goes into liquidation, the directors will be deemed not to have properly fulfilled their fiduciary duties and could be held personally liable for any deficit in liquidation.